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Relevant Docket Entries

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DATE	FILINGS—PROCEEDINGS
1-28-66	Complaint filed. Summons issued.
3-11-66	Notice of motion pursuant to Rule 12(b) filed, dismissing action etc. (ret April 13, 1966).
5-10-66	By ZAVATT, CH. J.—Decision rendered on motions—Pltff's motion to convene a three-judge court is denied—Defts' motion to dismiss the complaint is granted—Settle order consistent herewith on or before 10 days from the date hereof. (See opinion filed)
6- 8-66	NOTICE OF APPEAL FILED.
7-11-67	Certified copy of Court of Appeals judgment filed. It is Ordered that the order of the District Court is reversed, and that the action be remanded in accordance with the opinion of this court with costs to the appellant. (See opinion filed)
9-18-67	By J. Edward LUMBARD, Ch. J. Court of Appeals —Order (signed 9/12/67) filed designating Hon. Leonard P. Moore, C.J.,—Hon. John R. Bartels, D. J.,—Hon. Jack Weinstein D. J. to head and determine said cause etc. (P/C mailed to attys)
12-13-67	Before LEONARD P. MOORE, C.J., JOHN R. BARTELS, DJ., JACK WEINSTEIN, D.J., Hearing on defts' motion to dismiss complaint held and concluded—Decision reserved.
3-14-68	By LEONARD P. MOORE, U.S.C.J., JOHN R. BARTELS, U.S.D.J.—Decision rendered granting motion, complaint dismissed. (see opinion)
3-14-68	By WEINSTEIN, J.—Dissenting opinion filed. The motion to dismiss should be denied. (See dissenting opinion)

Complaint

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

I. *Statement as to Jurisdiction*

1. This is a civil action brought by the plaintiff on his own behalf and on behalf of other similarly situated for an injunction to prevent deprivation under the color of New York law of certain rights, privileges and immunities secured to the plaintiff by the Constitution of the United States as hereinafter more fully set forth. The suit also seeks a judgment declaring Section 2012 of the Education Law of the State of New York and all the rules, regulations and administrative policies of the defendants adopted in accordance with Section 2012 sanctioning the deprivation of the plaintiff's rights are unconstitutional. Plaintiff also requests that the defendants submit a plan whereby the plaintiff and others similarly situated be allowed to register to vote in school board elections in the Union Free School District No. 15, Cedarhurst, New York.

2. Jurisdiction is conferred on this Court pursuant to Title 42, U. S. Code, Sections 1981 and 1983 and Title 28, U. S. Code.

3. The plaintiff is and has been a resident at 1632 Park Street, Atlantic Beach, New York, and has resided there since 1948 with the exception of serving two years in the United States Army in 1954-56 and four years at college

during the years of 1952-58, graduating from Syracuse University. Since 1960, he has steadily and permanently resided at this address. He is a native born citizen of the United States and a resident and domiciliary of the State of New York. He has been deemed eligible to vote in State and Federal elections in the district where he resides since October 8, 1959. He is unmarried, has no children, does not own any real property nor is he a leasee within the Union Free School District No. 15, Cedarhurst, New York, nor anywhere else.

4. The defendant, Board of Education of the Union Free School District No. 15, Cedarhurst, New York, is a body corporate with power to sue and be sued in its own name.

5. The defendant, Board of Education of the Union Free School District No. 15, Cedarhurst, New York, was created by an act of legislature of the State of New York and vested by the legislature with power and authority to make and enforce rules and regulations for the management and control of public schools within the said school district.

6. The defendant, Raymond S. Baron, is President, and Elliot Norwalk is Vice-President and Jesse Cestari, Mrs. Bardon Deixel, Ralph J. Edsel, J. Gibson Fruin and Mrs. Harold S. Rosenfeld are members of the Board of Education of the Union Free School District No. 15, Cedarhurst, New York. Each of them holds office and performs official duties and functions under the General Education Law of the State of New York, including Section 2012 of the Education Law of the State of New York and each of them is being sued in his or her official capacity.

II. *Factual Allegations*

7. The plaintiff repeats and reiterates each and every allegation heretofore mentioned in paragraphs 1 through 6, as though specifically set forth herein.

7. a) That the State of New York contributes to the Union Free School District #15, Cedarhurst, about 60-65% of its total school budget; plaintiff pays New York State taxes.

8. Plaintiff has on several prior occasions and the last time being on April 28, 1965, sought to register with the Union Free School District No. 15, Cedarhurst, New York, in order to vote in its school board elections and budgetary matters and he has at all times been rejected by the said defendants and their agents and employees from so registering on the ground that he was not qualified to register or vote under Section 2012 of the Education Law of the State of New York and the rules and regulations promulgated by the said defendants in accordance with the said Section 2012.

9. Section 2012 of the Education Law of the State of New York states as follows:

Education Law, Section 2012:

"A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is: 1. A citizen of the United States. 2. Twenty-one years of age. 3. A resident within the district for a period of thirty days next preceding the

meeting at which he offers vote; and who in addition thereto possesses one of the following three qualifications:

(a) Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase of, real property, in such district liable to taxation for school purposes, but the occupation of real property by a person as lodger or boarder shall not entitle such person to vote, or

(b) Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

(c) Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting. No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section."

10. Plaintiff not owning property, not being a leasee nor being a parent with school age children within the State School District has been automatically disqualified from registering in order to vote in the said school board elections within the said school district at any of the times that he has appeared to so register and will be so unqualified in the future as long as he continues to permanently reside in that school district and continues not to own real property or be a leasee, or be a parent of a school age child.

Plaintiff is a college graduate vitally interested in the performance of his community which includes the performance of the youth and their welfare and seeks a voice in its determination.

FIRST COUNT

11. Section 2012 of the Education Law of the State of New York and the defendants' rules and regulations with respect to registration in accordance with Section 2012 for school board elections are a violation of the equal protection clause and due process clause of the Fourteenth Amendment of the United States Constitution because they discriminate against the plaintiff and all non-property owners and non-parents of school age children and non-leasees and other people who don't exactly fit within the qualifications as set down in Section 2012 of the State Education Law within the said school district.

12. The practice of barring plaintiff and others so similarly situated from registration in school board elections is deeply rooted and is of long standing and governs future elections and has and will impair the plaintiff and others so similarly situated right to vote in school board elections within the said school district.

13. Because of Section 2012 of the Education Law of the State of New York and the defendants' rules and regulations in accordance therewith the plaintiff and others similarly situated are suffering irreparable injury for the redress of which they have no adequate remedy at law.

Prayer for Relief

Wherefore, the plaintiff prays this Court for a declaration that Section 2012 of the Education Law of the State of New York and all rules, regulations of the defendants in accordance therewith concerning school board elections within the Union Free School District No. 15 sanctioning the deprivation of the plaintiff and other similarly situated rights are unconstitutional and void. He also prays for a permanent injunction to enjoin and restrain the defendants from continuing to enforce Section 2012 of the State Education Law of the State of New York and the rules and regulations which affect and result in barring the plaintiff and others similarly situated from registering in the Union Free School District No. 15 School board elections. Plaintiff also requests that the defendants be required to submit a plan whereby the plaintiff and others similarly situated be allowed to register in all future Union Free School District No. 15 school board elections. Plaintiff prays also for such other further relief as to this Court may seem just and proper.

Respectfully submitted,

Murray A. Miller
Attorney for Plaintiff
305 Broadway
New York 7, N. Y.

(Verified January 26, 1966.)

Notice of Motion

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, the undersigned will move this Court at the Motion Part, to be held in the United States Court House, at 225 Washington Street, Borough of Brooklyn, City of New York, on the 13th day of April, 1966, at ten o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard, for an order, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, dismissing this action as to the defendants, Union Free School District #15, Raymond S. Baron, Jesse Cestari, Mrs. Bardon Deixel, Ralph J. Edsel, J. Gibson Fruin, Elliot Norwalk and Mrs. Harold S. Rosenfeld, as members of the Board of Education of said district, upon the grounds (1) that there is lack of jurisdiction over the subject matter, and (2) that the complaint herein fails to state a claim against the said defendants upon which relief may be granted.

Dated, Albany, New York,
March 4, 1966.

Yours, etc.,

CHARLES A. BRIND
Attorney for Defendants, Union Free School District #15 and the members of the Board of Education thereof,
Office & P. O. Address
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Albany, New York 12224

To:

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HON. SIDNEY R. FEUER
Clerk, United States District Court for the Eastern District of New York
Office & P. O. Address
United States Court House
225 Washington Street
Brooklyn, New York

Motion to Dismiss

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

The defendants, Union Free School District #15, Raymond S. Baron, Jesse Cestari, Mrs. Bardon Deixel, Ralph J. Edsel, J. Gibson Fruin, Elliot Norwalk and Mrs. Harold S. Rosenfeld, as members of the Board of Education of said district, upon the complaint herein, move the Court as follows, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure:

1. For an order dismissing the above-entitled action upon the ground that there is lack of jurisdiction over the subject matter; and

2. For an order dismissing the said action upon the ground that the complaint herein fails to state a claim against the said defendants upon which relief may be granted; and

3. For such other and further relief as may be deemed just and proper in the premises.

Dated, Albany, New York
March 4, 1966

CHARLES A. BRIND
Counsel, State Education Department and Attorney for Defendants
Office and P. O. Address
State Education Building
Albany, New York 12224

Opinion by the United States District Court, Eastern District of New York

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 66-C-76

MORRIS H. KRAMER,

Plaintiff,

—v.—

UNION FREE SCHOOL DISTRICT #15, RAYMOND S. BARON, JESSE CESIARI, BARDON DEIXEL, RALPH J. EDSEL, J. GIBSON FRUIN, ELLIOT A. NORWALK and HAROLD S. ROSENFELD,

Defendants.

May 10, 1966

ZAVATT, *Chief Judge.*

MEMORANDUM

Plaintiff, in this action, seeks an order pursuant to 28 U. S. C. §§ 2281 and 2284 convoking a three-judge constitutional court for the purpose of determining that New York Educational Law McKinney's Consol. Laws, c. 16, § 2012 is unconstitutional and restraining defendants from enforcing that section in the forthcoming election in Union Free School District No. 15. Plaintiff further requests that a three-judge court order defendants to submit a plan where-

by plaintiff will be permitted to register to vote in all future school board elections in said District No. 15. Defendants, on the other hand, move to dismiss the action on the grounds that this court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief may be granted. There is neither diversity of citizenship nor an amount of money in controversy. If this court has jurisdiction, it can only lie under 28 U. S. C. § 1343 which provides in part:

> "The district courts shall have original jurisdiction of any civil action authorized by law[1] to be commenced by any person:
>
> • • • • •
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States • • •."

Title 2 of New York's Education Law, provides for the organization of school districts within the State. Article 41 thereof provides for district meetings. Plaintiff, herein, challenges the constitutionality of the statutory qualifica-

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[1] "§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U. S. C. § 1983.

tions for voters at district meetings embodied in § 2012 thereof, which provides:

"§ 2012. Qualifications of voters at district meetings

A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is: 1. A citizen of the United States.

2. Twenty-one years of age.

3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

a. Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase of, real property in such district liable to taxation for school purposes, but the occupation of real property by a person as lodger or boarder shall not entitle such person to vote, or

b. Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

c. Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting.

No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section."

As amended L. 1956, c. 497, eff. April 9, 1956. Plaintiff, an unmarried adult, residing in the district with his rent-paying parents, is not permitted to register to vote under this statute. He claims that the statute violates the "XIV Amendment to the Constitution of the United States, in that it denies the Plaintiff and others similarly situated their privilege, as Citizens of the United States, of their right to vote."

A. *Convening a three-judge district court*

28 U. S. C. § 2281 provides:

> "§ 2281. Injunction against enforcement of State statute; three-judge court required
>
> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The principles governing a district judge on a motion to convene such a court are set out in Ex parte Poresky, 290 U. S. 30, 31-32, 54 S. Ct. 3, 4-5, 78 L. Ed. 1, 2 (1933):

> " • • • [I]f the court [is] warranted in taking jurisdiction and the case [falls within § 2281], a single judge [is] not authorized to dismiss the complaint on the

merits, whatever his opinion of the merits might be. * * * [T]he provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction. In the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented. 'A substantial claim of unconstitutionality is necessary for the application of [§ 2281].' * * * That provision does not require three judges to pass upon this initial question of jurisdiction.

The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. * * * The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' * * *

While it is appropriate that a single District Judge to whom application is made for an interlocutory injunction restraining the enforcement of a state statute should carefully scrutinize the bill of complaint to ascertain whether a substantial question is presented, to the end that the complainant should not be denied opportunity to be heard in the prescribed manner upon a question that is fairly open to debate, the District Judge clearly has authority to dismiss for the want of jurisdiction when the question lacks the necessary substance and no other ground of jurisdiction appears. * * *"

See also Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U. S. 713, 715, 82 S. Ct. 1294, 1296, 8 L. Ed. 2d 794 (1962).

B. *The substantiality of the question*

The court recognizes that "the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate." Harper v. Virginia State Board of Elections, 383 U. S. 663, 666, 86 S. Ct, 1079, 1081, 16 L. Ed. 2d 169 (1966). In the instant case, however, we have no class distinction based on race, sex or wealth-distinctions prohibited by the Federal Constitution, based on degree of interest in the local *Harper,* supra, but rather a distinction and special subject matter to which the state statute is directed.

Plaintiff does not and cannot allege that his property is being taxed by the school district without his having a vote, since he owns no property in the district. Neither does he nor can he allege that the education of his children is being affected without his having a vote, since he has no children.

The mere fact that a state legislature, representing the majority will of the state's population, enacts a statute which discriminates between certain classes of its citizens, does not per se render the statute constitutional, Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U. S. 713, 736-737, 84 S. Ct. 1459, 1474, 12 L. Ed. 2d 632 (1964), but that fact does entitle the statute to a presumption of validity. See e. g., People of the State of New York v. O'Neill, 359 U. S. 1, 79 S. Ct. 564, 3 L. Ed. 2d 585 (1959).

The statute challenged in this court has already survived a similar challenge in the courts of the State of New York, a State whose constitution also provides for equal protection of the law, N. Y. Const. Art. I, § 11, and basic equality

in voting rights, id., Art. II, § 1. Challenged, *inter alia*, on the ground that the statute violated the equal protection clause of the federal constitution, the constitutionality of § 2012 was upheld by the Supreme Court of Nassau County, Turco v. Union Free School District Number Four, 43 Misc. 2d 367, 251 N. Y. S. 2d 141 (1964), aff'd, 22 A. D. 2d 1018, 256 N. Y. S. 2d 553 (A. D. 2d Dep't 1964), appeal dismissed, 15 N. Y. 2d 967 (1965).

These distinctions drawn by the legislature of the State in § 2012 of the New York Education Law are so clearly reasonable and plaintiff's claim so obviously without merit, that it can only be characterized as frivolous. The court, therefore, lacks jurisdiction. Ex parte Poresky, supra.

Plaintiff's motion to convene a three-judge court is denied. Defendants' motion to dismiss the complaint is granted. Settle an order consistent herewith on or before ten (10) days from the date hereof.

Opinion by the United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

(Argued April 19, 1967 Decided June 21, 1967.)

No. 428, Docket 31105

MORRIS H. KRAMER,

Plaintiff-Appellant,

v.

UNION FREE SCHOOL DISTRICT No. 15, RAYMOND S. BARON, JESSE CESTARI, BARDON DEIXEL, RALPH J. EDSEL, J. GIBSON FRUIN, ELLIOT A. NORWALK and HAROLD S. ROSENFELD,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,* and KAUFMAN and HAYS, *Circuit Judges.*

HAYS, Circuit Judge:

Plaintiff, Morris H. Kramer, appeals from an order entered in the United States District Court for the Eastern District of New York denying his motion to convene a three-judge court under 28 U. S. C. § 2281,[1] and dismissing

[1] § 2281. *Injunction against enforcement of State statute; three-judge court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restrain-

his complaint in an action to declare unconstitutional New York State Education Law McKinney's Consol. Laws, c. 16, § 2012,[2] which establishes qualifications for voting at school district meetings, and to enjoin its enforcement. The opinion of the district court is reported at 259 F. Supp. 164 (E. D. N. Y.), petition for writ of mandamus denied sub nom. Davis v. Union Free School District No. 7, 385 U. S.

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ing the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[2] § 2012. *Qualifications of voters at district meetings.*

A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is:

1. A citizen of the United States.
2. Twenty-one years of age.
3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

   a. Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase of, real property in such district liable to taxation for school purposes, but the occupation of real property by a person as lodger or boarder shall not entitle such person to vote, or

   b. Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

   c. Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting.

No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section.

807, 87 S. Ct. 172, 17 L. Ed. 2d 121 (1966). We hold that plaintiff's claim that the school district voting qualifications deny him equal protection of the laws raises a constitutional question which is not frivolous and which should therefore be heard by a three-judge court.

Plaintiff, a twenty-eight year old bachelor, is a resident of Atlantic Beach, New York, where he has lived with his parents in their private home for the past twenty years. Atlantic Beach is one of the communities included in Union Free School District No. 15.

Plaintiff's complaint alleges that, although he is a citizen of the United States and has voted in federal and state elections since 1959, he has been denied the right to vote in school district elections because he does not possess the special voter qualifications required by Section 2012 of the New York Education Law (set out in full in footnote 2, supra). Plaintiff asks that a three-judge court be convened to declare Section 2012 unconstitutional. The district court ruled against plaintiff, rejecting as insubstantial his contention that by enfranchising taxpayers, parents and certain others, while disenfranchising him, Section 2012 denies him equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution.

Plaintiff's appeal is properly before this court. See Utica Mutual Ins. Co. v. Vincent, 375 F. 2d 129 (2d Cir. 1967), citing Bell v. Waterfront Comm'n, 279 F. 2d 853, 858 (2d Cir. 1960).

The fact that defendants are a local school board and its members rather than state officials does not furnish a basis for the denial of the application to convene a three-judge court, since "this is a case where the state statute that is challenged applies generally to all * * * school boards of the type described." Sailors v. Board of Educa-

tion, 387 U. S. 105, 107, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1967) (footnote omitted).

The principles to be applied in deciding whether a three-judge court should be convened have been succinctly stated by the Supreme Court:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U. S. 713, 715, 82 S. Ct. 1294, 1296, 8 L. Ed. 2d 794 (1962); see Schneider v. Rusk, 372 U. S. 224, 83 S. Ct. 621, 9 L. Ed. 2d 695 (1963); Ex parte Poresky, 290 U. S. 30, 31-32, 54 S. Ct. 3, 78 L. Ed. 152 (1933); cf. Bailey v. Patterson, 369 U. S. 31, 33, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962).

While we express no view as to what should be the ultimate disposition of plaintiff's claim, we hold that he has raised a constitutional claim of sufficient substance to require that a three-judge court be convoked.

It may be true, as the appellees argue, that the state need not permit its citizens to vote on the matter with which Section 2012 is concerned. See Sailors v. Board of Education, supra. However, as the Supreme Court has held, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Harper v. Virginia Bd. of Elections, 383 U. S. 663, 665, 86 S. Ct. 1079, 1081, 16 L. Ed. 2d 169 (1966).

Appellees concede that "the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate" (Harper v. Virginia Bd. of Elections, supra, 383 U. S. at 666, 86 S. Ct. at 1081), but they contend that the classification scheme of Section 2012 rests "on real and not feigned differences," and that the distinctions drawn "have some relevance to the purpose for which the classification is made" and are not wholly arbitrary. See Walters v. St. Louis, 347 U. S. 231, 237, 74 S. Ct. 505, 98 L. Ed. 660 (1954). They argue that the statute is therefore consistent with the equal protection clause, that plaintiff's constitutional claim is frivolous and that a three-judge court need not be convened.

We do not consider frivolous the claim that a voter classification system which disregards plaintiff's interest in issues of public education while recognizing a taxpayer's economic interest constitutes an unreasonable discrimination in violation of the Fourteenth Amendment. In the *Harper* case the Supreme Court held

> "that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." 383 U. S. at 666, 86 S. Ct. at 1081 (footnote omitted).

We do not hold that the *Harper* case, which involved voter qualifications for statewide elections, necessarily controls this one, which is concerned with local elections on limited issues.[3] We hold only that the questions presented,

[3] The Supreme Court has characterized the functions of a Board of Education as "essentially administrative" and "not legislative in

including the applicability of the *Harper* decision, must be resolved by a three-judge court.

Moreover public education is a matter of general concern to all citizens and it is not self-evident that the right to vote on questions of public education can properly be denied to others while permitted to parents and to those having school children living with them.

Although we reverse the decision and remand the case for submission to a three-judge court, we wish to add a word concerning the role of the district judge in cases where a three-judge court is requested. We have recently stated that the district judge's obligation to determine whether a constitutional claim is sufficiently substantial to be submitted to a three-judge court is "an important responsibility, since the requirement of three judges 'entails a serious drain upon the federal judicial system • • •' Phillips v. United States, 312 U. S. 246, 250, 61 S. Ct. 480, 85 L. Ed. 800 (1941), a burden not only on the inferior courts but, if the three judges retain the case, upon the Supreme Court by virtue of the provision for direct appeal, 28 U. S. C. § 1253." Utica Mutual Ins. Co. v. Vincent, supra, 375 F. 2d at 131 (footnote omitted). When, as in this case, the district judge has carefully examined the issues presented and has taken the time to write a reasoned opinion, reversal of his decision compounds the burden on the federal judicial system. Still there will be cases where the question of the substantiality of the constitutional issue involved is a close one and where this court disagrees with the district court as to whether a three-judge court should be convened. Although an occasional reversal is therefore

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the classical sense." Sailors v. Board of Education, supra, 387 U. S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650.

the inevitable price of a district judge's exercise of his responsibility in cases where a three-judge court is requested, the risk of reversal is much to be preferred to the alternative of automatically convening a three-judge court to hear such claims without a careful consideration of their substantiality.

The decision is reversed and the case remanded.

IRVING R. KAUFMAN, Circuit Judge (concurring):

I agree with my brother Hays that a three-judge court should be convened because I am unable to conclude that appellant's constitutional challenge to § 2012 of the New York State Education Law is "insubstantial." But, it should not be inferred from my concurrence in the result that I believe the converse is true and that I view appellant's claim as being meritorious. We are, after all, dealing in a very misty area when we struggle to determine the propriety of convening a three-judge court. The Supreme Court's recent decisions in Moody v. Flowers, 385 U. S. 966, 87 S. Ct. 1544, 17 L. Ed. 2d 431 (1967), Dusch v. Davis, 385 U. S. 999, 87 S. Ct. 1554, 17 L. Ed. 2d 540 (1967), and Sailors v. Board of Educ., 385 U. S. 966, 87 S. Ct. 1549, 17 L. Ed. 2d 431 (1967), bear witness to the difficulty the courts have encountered.

In the case before us, while the defendants are not state officials, they are "functioning pursuant to a statewide policy and performing a state function." Moody v. Flowers, 385 U. S. 966, 87 S. Ct. at 1548. And, as Judge Hays correctly notes, the statute being challenged "applies generally to • • • all school boards." Sailors v. Board of Educ., 385 U. S. 966, 87 S. Ct. at 1551. In these circumstances, appellant's constitutional challenge, which I have stated cannot be said to be insubstantial on its face, should prop-

erly be examined in the first instance by a three-judge court.

LUMBARD, Chief Judge (dissenting):

I dissent. There is no need for three judges to consider a claim so patently without any merit.

I agree with my brothers that a district judge should carefully weigh the substantiality of any claim that a state law is in conflict with the federal Constitution before convening a three-judge court to determine it. And it is settled that a single judge may dismiss even a novel claim as insubstantial if it is "obviously without merit," Ex parte Poresky, 290 U. S. 30, 32, 54 S. Ct. 3, 78 L. Ed. 152 (1933), and that a claim is not substantial simply because analysis is required to demonstrate its insubstantiality. See, e. g., Utica Mut. Ins. Co. v. Vincent, 375 F. 2d 129 (2 Cir. 1967). Accordingly, I would affirm Judge Zavatt's holding that the constitutional issues raised by plaintiff's complaint are insubstantial, for reasons which I shall briefly indicate. In view of my brothers' decision to remand this case to a three-judge court, it would be inappropriate for me to set forth at length my views upon the merits. Compare Stratton v. St. Louis S. Ry., 282 U. S. 10, 51 S. Ct. 8, 75 L. Ed. 135 (1930).

Plaintiff contends that New York State's decision to limit the suffrage in elections for school district trustees[1] to

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[1] It should be noted that these qualifications do not apply to city school districts. In New York, Buffalo, Yonkers, Albany, and cities with less than 125,000 inhabitants which so elect, the board is appointed by the mayor and/or counsel. N. Y. Education Law, §§ 2531, 2553(2), (4). In other cities, the board is elected by the resident voters of the district. N. Y. Education Law, §§ 2553(3), 2603.

the two groups it deems most directly concerned with public education, parents and the owners or lessees of real property whose taxes meet the district's budget, N. Y. Education Law, § 1717(1), is so "palpably arbitrary," Allied Stores of Ohio, Inc. v. Bowers, 358 U. S. 522, 527, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1959), and so "wholly irrelevant to the achievement of the State's objective," McGowan v. State of Maryland, 366 U. S. 420, 425, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 (1961), as to deny residents of the district who are neither parents nor owners or lessees of real property the equal protection of the laws. It is a sufficient answer that New York's conclusion that parents and taxpayers are more vitally interested in the administration of public schools than others is plainly not arbitrary; for example, these groups, and generally no others, have been accorded standing in the federal courts to challenge the operation of the public schools. See Doremus v. Board of Educ., 342 U. S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952).

Plaintiff argues, however, that the arbitrariness of the voter qualifications New York has set for school district elections is established by the Supreme Court's decision in Harper v. Virginia Bd. of Elections, 383 U. S. 663, 668, 86 S. Ct. 1079, 1082, 16 L. Ed. 2d 169 (1966), which struck down a poll tax as a condition of voting in an election for a state legislature, on the grounds that

> "[t]he principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors," see Reynolds v. Sims, 377 U. S. 533, 554-571, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), "by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay,"

and that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." In my view *Harper*, which dealt with a flat monetary condition upon the right to vote in a statewide legislative election, is wholly inapplicable to qualifications for voting for a local administrative body, like a New York school district,[2] which are reasonably based on the likely degree of a would-be voter's knowledge of and concern in the body's activities. I reach this conclusion even assuming *arguendo*, as the Supreme Court did in Sailors v. Board of Educ., 385 U. S. 966, 87 S. Ct. 1549, 17 L. Ed. 2d 431 (1967), that the one-man, one-vote rule of Reynolds v. Sims applies whenever "a State provides for an election of a local official or agency—whether administrative, legislative, or judicial."

Any attempt to ascertain the rationale of *Harper* is embarrassed by the Court's failure clearly to articulate the basis for its judgment that the poll tax requirement was irrational and arbitrary. See Bickel, The Voting Rights Cases, 1966 Sup. Ct. Rev. 79, 93-95 (Kurland ed.); Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 95-96 (1966). Nevertheless, several considerations persuade me that *Harper* does not draw into question reasonable qualifications for voting in local administrative elections. First, the Court specifically noted in *Harper* that only four states conditioned the statewide franchise upon payment of a poll

[2] The chief duties of New York school districts are to build and maintain schools, employ teachers, and prescribe courses of study. See N. Y. Education Law, §§ 1604, 1709. These duties parallel those of Michigan county boards of education, which the Supreme Court in Sailors v. Board of Educ., 385 U. S. 966, 87 S. Ct. 1549, 17 L. Ed. 2d 431 (1967), termed "essentially administrative" and "not legislative in the classical sense."

tax. 383 U. S. at 666 n. 4, 86 S. Ct. 1079, 16 L. Ed. 2d 169. By contrast, the franchise in local elections concerning, for example, water supply, sanitation removal, fire protection, and the operation of parks and schools is very commonly limited to those who use and/or pay for the services.[3] And such limitations have a readily apparent and rational basis, the greater concern and awareness of those who use and pay for such services, for which there is no analogue when voting in a statewide legislative election is conditioned upon payment of a poll tax. In fact, when Congress declared in section 10(a) of the Voting Rights Act of 1965, 79 Stat. 442 (1965), 42 U. S. C. § 1973h(a), that

> "the payment of a poll tax as a precondition to voting * * * (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections,"

it was made clear in the House and Senate debates that this finding was not intended to apply to property qualifications in school district and other local administrative elections.[4] Second, the poll tax requirements struck down by *Harper* were apparently adopted to disfranchise Negro

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[3] For example, New York limits voting upon propositions entailing expenditure of money by a town or village to residents owning assessed property in the town or village. See N. Y. Town Law, McKinney's Consol. Laws, c. 62, § 84(1); N. Y. Village Law, McKinney's Consol. Laws, c. 64, § 4-402(b). See also N. Y. General Municipal Law, McKinney's Consol. Laws, c. 24, § 120-p; N. Y. Town Law, § 175(2).

[4] See 111 Cong. Rec. 10460 (1965) (remarks of Senators Dominick and Javits), 15710-12 (1965) (remarks of Representatives Celler and Hutchinson), 16218 (1965) (remarks of Representative McClory).

voters, see e.g., Harman v. Forssenius, 380 U. S. 528, 543-544, 85 S. Ct. 1177, 14 L. Ed. 2d 50 (1965), although the Court did not rest its decision in *Harper* upon this ground. 383 U. S. at 66 n. 3, 86 S. Ct. 1079, 16 L. Ed. 2d 169. It has not been suggested that New York's school district voting qualifications are racially motivated. Third, the salient vice of a restriction upon voting in statewide elections is that it tends to perpetuate itself by denying those it disadvantages any opportunity to remove it through democratic processes. See The Supreme Court, 1965 Term, 80 Harv. L. Rev. 91, 180 n. 23 (1966). By contrast, plaintiff can seek to have his exclusion from the school district franchise repealed by the New York legislature, for which his vote is unimpaired.

Federal courts have manifested the utmost reluctance to impose federal constitutional limitations upon qualifications for voting in local elections. See, e.g., O'Neill v. Leamer, 239 U. S. 244, 248, 36 S. Ct. 54, 60 L. Ed. 249 (1915); Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151 (1907). Sailors v. Board of Educ., 385 U. S. 966, 87 S. Ct. 1549, 17 L. Ed. 2d 431 (1967), which recognizes that

> "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions,"

makes it clear that this reluctance has not been dissipated by Baker v. Carr, 369 U. S. 186, 226-232, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), and Gomillion v. Lightfoot, 364 U. S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960). Whether school district trustees should be elected by taxpayers, by parents, by both, or by all residents is not an issue to

be resolved by the federal courts. A complaint which seeks to have them do so is in my opinion insubstantial.

The circuit and district judges in the federal system are fully occupied with matters of substance which have an undeniable claim on their attention; we do no service to anyone by dignifying a claim so patently without merit by requiring three judges to convene and consider it, simply because my brothers do not think it insubstantial. As another panel of this court recently said, "When the single district judge has denied the injunction and three circuit judges are convinced that the pleadings show the claim to lack merit, they accomplish little save elegantia juris by reversing because they are not completely certain that the lack was so obvious as to have warranted dismissal by one judge rather than three." Green v. Board of Elections, 2 Cir., 380 F. 2d 445 (June 13, 1967).

Majority Opinion of the United States District Court, Eastern District of New York

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MORRIS H. KRAMER,

Plaintiff,

—against—

UNION FREE SCHOOL DISTRICT No. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Defendants.

MOORE, *Circuit Judge*:

This is a class action in which plaintiff seeks to have a state statute declared unconstitutional and its enforcement enjoined. The complaint, asserting federal jurisdiction under 42 U. S. C. §§1981 and 1983 and 28 U. S. C., is brought on behalf of plaintiff and others similarly situated to have this court declare §2012 of the New York Education Law[1] unconstitutional because it denies them equal

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[1] Section 2012, Education Law of New York State:

"§2012. Qualifications of voters at district meetings

A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other mat-

protection of the laws and a republican form of government in violation of the Fourteenth Amendment and Article 4, Section 4 of the Federal Constitution. More specifically, he requests that a judgment be entered declaring §2012 to be unconstitutional, that a permanent injunction be issued against defendants from enforcing said Section; and that defendants submit a plan whereby plaintiff and others similarly situated be allowed to register in future school board elections.

The defendants are the Union Free School District No. 15, Cedarhurst, New York, and members of the Board of Education thereof.

The facts alleged in substance are:

Plaintiff, Morris H. Kramer, a college graduate, is a twenty-eight-year-old bachelor who resides in the private

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ters which may be brought before such meeting, who is: 1. A citizen of the United States.

2. Twenty-one years of age.

3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

a. Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase of, real property in such district liable to taxation for school purposes, but the occupation of real property by a person as lodger or boarder shall not entitle such person to vote, or

b. Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

c. Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting.

No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section."

home of his parents located in Atlantic Beach, New York, within the confines of District No. 15. He has lived with his parents for many years, and he has voted in federal and state elections since 1959. He is not a property owner, a lessee or a parent with school-age children. On April 25, 1965, he attempted to register in the forthcoming school district election, but his application was rejected by defendants on the ground that he failed to meet the special voter qualifications set forth in Section 2012.

On March 4, 1966, defendants moved to dismiss the complaint (1) for lack of subject matter jurisdiction, and (2) for failure to state a claim. On March 17, 1966, plaintiff moved to convene a three-judge court to hear and determine the alleged constitutional issue.

The district court denied the motion to convene a three-judge court and granted defendants' motion, dismissing the complaint on the merits, 259 F. Supp. 164, E. D. N. Y. A petition for a writ of mandamus to direct the convocation of a three-judge court was denied by the Supreme Court sub nom. *Davis* v. *Union Free School District No. 7*, 385 U. S. 807 (1966).

On appeal to the Court of Appeals, the Court in three separate opinions, one a dissenting opinion, reversed and remanded, 379 F. 2d 491 (1967). Judge Hays in his opinion held that there was "a constitutional claim of sufficient substance to require that a three-judge court be convoked." Judge Kaufman concurred because he could not "conclude that appellant's challenge to §2012 of the New York State Education Law is 'insubstantial' ", but warned against any inference therefrom that he viewed "appellant's claim as being meritorious" (p. 495). Chief Judge Lumbard dissented on the ground that the claim was "so patently with-

out any merit" and that the constitutional issues were "insubstantial."

As a result of the remand by the Court of Appeals, the responsibility of this three-judge court is to hear and determine whether Section 2012 is unconstitutional. Such hearing has been held, and the parties have submitted by reference the briefs in the case before the Court of Appeals as well as supplementary briefs.

Less than one-third of the local school systems in the State of New York are organized as Union Free School Districts under the statute which nevertheless represents a statewide policy.[2] The voters in such districts who have qualified under §2012 may attend the district meetings which are held at least once a year (N. Y. Ed. L. §2002). At such a meeting they approve the school budget and vote to levy the taxes on taxable real property in the school district necessary to meet the expenses for the coming year. See N. Y. Ed. L. §§2021, 2022. The voters in each school district also elect from their number three to nine Trustees who act as the Board of Education. See N. Y. Ed. L. §§1701, 2101(2), 1702. The Board of Education is the body which prescribes the course of study to be followed in the district schools, decides on the text-books, purchases or builds schools (when authorized at a meeting), hires teachers, and makes other educational policy decisions. See N. Y. Ed. L. §1709. While the Board of Education generally cannot spend more money than is appro-

[2] Section 2012 is not applicable to city school districts in New York, Buffalo, Rochester, Syracuse, Yonkers and Albany and in cities with less than 125,000 population. In those cases the Board is appointed by the Mayor and/or Council (New York Education Law §§2531, 2553(2)) and the population of those districts exceeds two-thirds of the population of the state.

priated at the district meeting (§1718), it has the sole power to set teachers' salaries (§2022) and it can pay teacher salaries and "ordinary contingent expenses" even if the voters neglect or refuse to appropriate money to cover the same (§2023). Additional funds to cover the cost of operating the district school systems may be received from the federal and state governments.

In making this attack the plaintiff in addition seeks to invalidate the statute upon the ground that it also denies voting rights to others not in his class. Although such expanded representation would not strengthen his claim, it is appropriate to point out that plaintiff is not in a position, either individually or by his class action, to represent members of other classes not similarly situated. "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of a third party. Reference to this rule is made in varied decisions" (*Barrows* v. *Jackson*, 346 U. S. 249, 255 (1953)); *Mapp* v. *Board of Education of City of Chattanooga, Tenn.*, 319 F. 2d 571 (6 Cir. 1963); *Thaxton* v. *Vaughn*, 321 F. 2d 474 (4 Cir. 1963); 3A Moore's Federal Practice §23.07(2) at 3427 (2d Ed. 1967); see also, *Hamer* v. *Campbell*, 358 F. 2d 215 (5 Cir. 1966); *Nesbit* v. *Statesville City Board of Education*, 232 F. Supp. 288 (W. D. N. C. 1964), *decision vacated*, 345 F. 2d 333 (4 Cir. 1965); *Carroll* v. *Associated Musicians of Greater New York*, 316 F. 2d 574 (2 Cir. 1963).

The Legislature of the State of New York, in the statute here under attack, has limited the franchise in Union Free School District elections to those district residents who, it believes, have a direct interest in the administration of the school system because they are either real estate taxpayers (or renters of taxable real estate) and thus

carry the burden of paying for a major share of the services provided by the school districts, or because they are directly involved as parents of pupils attending the schools in question. Specifically, three groups are enfranchised by §2012:

(a) School district residents who own taxable real property, and their spouses,

(b) School district lessees, but not their spouses,

(c) Parents or guardians of children attending district schools.

Among the groups not enfranchised by the statute are adults such as plaintiff who reside in family homes. (See also §2012(3)(a): "the occupation of real property by a person as lodger or boarder shall not entitle such person to vote.") Plaintiff argues that this is a discrimination based on property or wealth and as such is a denial of equal protection of the laws in violation of the Fourteenth Amendment.

Plaintiff places much emphasis on *Harper* v. *Virginia Board of Education*, 383 U. S. 663 (1966), in which the United States Supreme Court held Virginia's poll tax to be unconstitutional. In broad terms the Court stated that "it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment" (383 U. S. at 665). The Court also there said: "we conclude that a state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth

nor to paying or not paying this or any other tax. . . . the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process" (383 U. S. at 666, 668).

Thus, the Court, while conceding a State's power to fix voter qualifications, held that wealth was not a proper standard for qualification in general elections. Of a similar character is the recent New York Court of Appeals decision in *Landes* v. *Town of North Hempstead*, 20 N. Y. 2d 417, 284 N. Y. S. 2d 441, 231 N. Y. 2d 120 (1967). There the plaintiff, a duly designated nominee of the Democratic party for the office of councilman, brought the action to have declared unconstitutional sections of the New York Town Law which required a holder of an elective town office to be an owner of record of real property within the town. The plaintiff did not then own property, having transferred title to his home to his wife. The court held the statute unconstitutional because it found that insofar as over-all town government was concerned, the property qualification was unrealistic and "that it is impossible today to find any rational connection between qualifications for administering town affairs and ownership of real property." The court recognized that a large proportion of the population in many towns, especially in suburban areas, are apartment house dwellers and that such a statute would make ineligible for the position of councilman an otherwise well qualified candidate merely because real property was not registered in his name.

All parties are in accord that statutes passed by a state legislature carry with them a presumption of validity, and that the classifications made in such enactments will not be

struck down unless they make invidious discriminations, are patently arbitrary or are irrelevant to the achievement of the state's objective, *Carrington* v. *Rash*, 380 U. S. 89 (1965); *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961); *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 50-51 (1959); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 527 (1959). The defendants argue that it is not unreasonable for the legislature to determine that the local school system should be run by those who have a direct interest in it, namely, those who have to pay for it and those who benefit from its services. We are of the opinion that this argument is well taken when applied to the narrow issue before us—the denial of the franchise to those school district residents whose interest in educational policy and the financing thereof is at best indirect and weak, compared to the concern of those who are franchised.

The Supreme Court in *Harper* has held, in effect, that everybody is affected by, and directly interested in, a general election; both the rich and the poor should have an opportunity to vote for those who will govern them. In *Landes* v. *Town of North Hempstead, supra*, the New York Court of Appeals has said that property considerations should not control elections for councilman, because the decisions reached by those bodies (despite the "local" nature of the issues) directly affect all the residents of the village. However, it is not inconsistent with this principle to hold that the states may require those seeking to vote on school policy to have a direct interest or stake in the issues to be decided and to exclude those who do not. Plaintiff has not indicated that any decisions reached by those assembled at the district meeting or by the Board of Education for the district will affect him in any way. His argu-

ment is that the vote is given to owners and lessees of property; ergo, it must be given to him as well. This argument fails to take into consideration the difference between the situations before the courts in *Harper* (a general state election) and *Landes* (a general town election) and the situation before this court (a school district election). The latter is a local election on limited issues as to which certain local residents have a far greater direct interest than others.[3] The Supreme Court has recently noted that a school board "performs essentially administrative functions; and while they are important, they are not legislative in the classical sense." *Sailors* v. *Board of Education of the County of Kent*, 387 U. S. 105, 110 (1967). The difference in the type of election involved makes the voter qualifications of §2012 "rational" and within the limits of the State's power to fix them.

The quality of public education is controlled in large part by the personal interest of those members of the community who are most vitally affected thereby. The group most interested should be the parents. The effective participation by their offspring in coping with the problems of the next generation will be influenced by the strength of their educational foundation. Good education, however, is more than a metaphysical concept; it must be implemented, particularly in this age of rapidly expanding technology, in all fields, with modern buildings and faculty. The geographic areas in which the Section 2012 school districts function differ substantially from those of the large cities where there are no Board of Education elections. In the smaller

[3] Property ownership, it should be noted, is only one of several alternative conditions which the Legislature has chosen as indicia of direct interest in the local school system.

communities, there should be found a greater identity of interest with education on the part of the parent and taxpayer groups, the parents because of their supervision over their children, and the taxpayers because of their responsibility for the school capital and operating budgets. Persons in plaintiff's category obviously do not have the same permanency of attachment or interest in the school district as those in the other categories. It is suggested in support of plaintiff's claim, that the court take judicial notice of certain background conditions, social, political and economic, including the impact of the Board's fiscal decisions upon the price of goods and services and certain non-property taxes, all of which it is alleged indirectly affect plaintiff.[4] Apart from the questionable propriety of taking judicial notice of some of these vague generalizations, those factors only suggest possible effects which peripheral activities of the school system might have on plaintiff. However, schools are erected and operated primarily for the education of children, and parents and those closely allied to the community by leases or property ownership are obviously the most interested and affected. The right of suffrage may be limited where the rationale of the exclusion is so directly related to the objective to be achieved. See *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45 (1959); *Pope* v. *Williams*, 193 U. S. 621 (1904). Therefore, the Legislature, in acting within its

[4] "But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*" (*Lochner* v. *New York*, 198 U. S. 45, 76 (1905)). and the payment of non-property local taxes or other indirect taxes affords plaintiff no standing to attack the statute or any basis for a voice in the election of members of the school board. *Doremus* v. *Board of Education*, 342 U. S. 429, 433 (1952); *Thomas* v. *Gay*, 169 U. S. 264, 276 (1898).

power to fix voter qualifications, did not discriminate in an unreasonable or unrealistic manner. Quite to the contrary, the selection of the parent and taxpayer groups definitely would appear to be within the permissive limits of power still preserved by state legislatures as specified both by the Supreme Court and the New York Court of Appeals.

Plaintiff's reliance on the Guaranty Clause is without merit as it does not present a justiciable issue. See *Baker* v. *Carr*, 369 U. S. 186, 222-29 (1962).

Complaint dismissed.

/s/ LEONARD P. MOORE
U. S. D. J.

/s/ JOHN R. BARTELS
U. S. D. J.

Brooklyn, New York.

March 14, 1968.

Dissenting Opinion of the United States District Court, Eastern District of New York

Section 2012 of the New York Education Law permits the great majority of citizens—resident property holders and lessees of apartments and parents of children attending the district's schools—to vote in elections of Union Free School Districts. Disenfranchised by the statute are the following groups of otherwise qualified voters:

1. young adults such as plaintiff residing in family homes;
2. boarders and lodgers;
3. elder citizens and others living in the homes of their children or other relatives;
4. spouses of persons renting homes;
5. parents not owning or renting homes whose children attend private or parochial schools;
6. parents, not owning or renting homes, whose children attend special public schools outside the district;
7. parents, not owning or renting homes, whose children are too young to attend public schools; and
8. clergy, military, and others living on tax exempt property.

The state's defense of section 2012 is predicated on the hypothesis that if a person neither has an offspring who attends public school nor pays a school tax, he does not possess an interest in school board elections sufficient to entitle him to vote. For reasons indicated below, the state's

assumption is unacceptable. An important characteristic of our political system is the diffusion of power among various levels of government. Local school boards exercise a very considerable portion of that power. Thus, a citizen excluded from participation in control of this locus of governmental force is deprived of a significant degree of control over the total government of this nation. Accordingly, pursuant to the mandate of the Equal Protection Clause of the Fourteenth Amendment, the motion to dismiss should be denied. Alternate grounds for sustaining the complaint are that it states a valid claim under the First Amendment and under the New York State Constitution.

The facts alleged must be construed in light of the social, political, and economic milieu in which the challenged statute operates. While these background conditions are not mentioned in the complaint, on a motion to dismiss for failure to state a cause of action, a court must give the pleader every reasonable benefit of potential proof and plausible inference. Its power—and its obligation—to take judicial notice is necessarily broad. This heightened sensitivity to the realities of our society is particularly important in a case involving public issues and claims of constitutional deprivation.

I. Significance of Local School Board Elections

An analysis of the role of education in America, particularly in the communities where section 2012 applies, demonstrates the great importance of the right asserted by plaintiff. Disallowance of the franchise in school board elections is a denial of equal power to control the expenditure of the major portion of locally raised funds and a substantial amount of state and federal money; it is a refusal of a

voice in the administration of adult education, recreation, library, and cultural enrichment programs which play an important role in the daily lives of citizens of voting age; it is a preclusion of effective participation in the decisions which determine the character and quality of the local community. It is, in short, a deprivation of one of the basic incidents of citizenship. No adult deprived of these rights, privileges and opportunities has the same stature and legal significance as those who enjoy them.

A. *Importance of Education in a Democratic Society*

An educational system constitutes a modern society's crucial genes. By shaping the minds and attitudes of the young, it determines their individual and collective future. Only through excellent schools and teachers can a democracy such as ours achieve the equality of opportunity and the informed electorate vital to its existence. In this country, the concern with education manifests itself in large sums of public and private money expended, in strong feelings of our citizens about current educational issues, and in studied attempts to preserve local control.

Last year the total expenditure on education in United States public and private schools was over fifty billion dollars, about seven percent of our gross national product. Approximately thirty billion dollars was spent for primary and secondary education in public schools. When the time of enrolled students, who number almost sixty million, is considered, education is clearly the predominant constructive activity of this nation.

Headlines daily furnish examples of the deep passions stirred by debate on control of educational policy. One of the substantial pressures on peaceful race relations has

come from the problems created by integration of schools. In the North as well as the South, people have at times abandoned the ballot and the courts and taken to the streets in an attempt to settle these problems. The right to vote in school board elections is the right to participate in attempts at controlling deep currents in our society which can nurture or destroy.

Control of American education remains primarily in local hands. Demands for further decentralization are being pressed. See, *e.g.*, Report of the Mayor's Advisory Panel on Decentralization of the New York City Schools ["Bundy Report"] (1967); Buder, Demands for Local Control Grow, New York Times, Jan. 12, 1968, p. 49, col. 4.

B. *Importance of Education in Suburban Communities*

Nowhere in the United States is greater significance attached to education than in the suburban communities in which section 2012 applies. The recent exodus from city to suburb has been due in large measure to the desire of parents to see their children educated in the best possible schools. At the very least, the quality of these schools has been a consideration weighed heavily by those who must choose in which suburb to settle. A striking example of the effect that a school system can have on a community was given by counsel for defendants on oral argument. He cited a recent incident in which a large industrial plant was established in Pennsylvania rather than in New York State because management personnel, scientists, and technicians were unwilling to subject their children to the inferior educational system available at the proposed New York cite.

Moreover, in suburbia the local school system is a focal point for the political energies of the adult population. In

an increasingly complex mass society, a local school board election may provide the major outlet for the political drives of residents who see in it an opportunity for effective, tangible and meaningful political action. Even on state and national political issues the suburban schools are of great importance, for it is in the school buildings that many of the debates and meetings are held.

Together with adult education programs, concerts, and theatre presentations held in the schools, such political discourse constitutes an important part of intellectual life outside our major cities. The local school board, by encouraging or discouraging use of school buildings for these purposes can have a significant effect on the adult community's intellectual and political characteristics.

C. *Importance of Cost of Education to Plaintiff*

The amount of money spent annually on education by both the private and public sectors of our economy is steadily increasing. The decisions reached by local school boards have an impact on the fiscal decisions of every level of government. Denial of the right to vote for school boards which administer these funds deprives plaintiff—a federal, state and county taxpayer—of the degree of control over the expenditure of this tax money enjoyed by those entitled to vote on school matters.

The federal government is involved in poverty programs like "Head Start," which are administered by local communities, in National Defense Education Act and other loan programs, and in direct aid to state and local school systems. Federal participation in programs of the Department of Health, Education and Welfare (H. E. W.) aiding education amounted to almost four billion dollars last year. An additional nine and one-half billion dollars was al-

located by the 90th Congress to fund H. E. W. programs designed to aid education over the next two years.

The state is also a major source of funds for local schools. In his 1968 budget message to the New York Legislature, the Governor of New York summarized the scope and impact of state aid to local schools as follows:

> "With the increases I propose, total aid to local communities to help pay the cost of primary and secondary education will amount to about $1.8 billion—approximately 36 per cent of the current revenue anticipated by the state in the 1968-69 fiscal year. The added aid included in my budget for primary and secondary education will consume more than 58 per cent of the revenue expected from the tax increases that I propose, and be a *significant factor in helping to hold down local property taxes.*" (Emphasis supplied.)

The fact that a citizen does not pay local school property taxes does not mean that he is not affected by school budgets. In the first place, the level of taxation in a local community influences the price of goods and services. In the second, as school taxes based on property increase, so do the pressures to reduce property taxes levied by the village, town, and county. Thus, decisions on school budgets can have a major impact on the administration of the other local units of governments which affect the daily lives of citizens like plaintiff. Finally, the structure of local government mandates that it is the county, towns and villages which bear the responsibility for much of the expense attributable to school district activities.

A study of the current budget for Nassau County, in which plaintiff resides, is instructive. School real estate

taxes are based on property assessments by the County Board of Assessors, whose expenses are paid from County taxes. Town Receivers of Taxes, whose staffs are paid from town taxes, collect school district taxes. For 1967-68, these school taxes amounted to over two hundred and thirty-eight million dollars. Together with the costs of collecting the taxes and other county government expenses for education —maintenance of a vocational educational program and a community college—these sums amount to fifty-two percent of all the monies raised in Nassau County from real property taxes.

County government tax revenues are partly based upon non-property taxes—including special taxes on pari-mutuel betting, permit and license fees, fines and forfeitures, and departmental revenues (and sales taxes in some parts of the state). These non-property local taxes which help support local education are paid by plaintiff and citizens similarly situated. Moreover, zoning and the construction of roads, parks and other county, town and village facilities are influenced by the location and design of local schools.

D. *Importance of Non-fiscal Aspects of Educational System to Plaintiff*

Since the school system is at the center of the social, cultural and recreational life of a suburban community, it is not difficult to understand its effect on plaintiff. Adult education programs, financed out of federal, state and local funds and controlled by local school boards, can provide a major source of intellectual stimulation and an opportunity for self-improvement or they may be dull and valueless. In Great Neck, a community in Nassau County, for example, the 1968 spring catalogue of the local school dis-

trict lists over one hundred and fifty adult education courses ranging from "Adult Guidance Testing Workshop" to "Yoga."

Libraries, whose appropriations can be governed by the same electorate which votes in school board elections (N. Y. Education Law §255), may contain the books that appeal to citizens like plaintiff or they may be little more than children's reading rooms. School funds may be spent on swimming pools and playing fields available to members of the adult community or on textbooks and teachers' salaries. The schools may provide concerts, quest speakers, and dramatic performances or they may be silent during non-school hours. A denial of the right to vote in school board elections is a denial of the right to participate in decisions on issues which can give meaning and satisfaction to the lives of citizens like plaintiff.

II. Applicable Law

A. *Rights Under the Federal Constitution*

1. *Equal Protection Grounds*

The validity of section 2012 must be measured by the standards of the Equal Protection Clause. In voting rights cases the rule to be gleaned from the decisions is this: the right to vote on important governmental issues may not be denied to a citizen with intellectual and moral capacity who meets prescribed reasonable age and residence requirements.

School boards need not be elective. *Sailors* v. *Board of Educ.*, 387 U. S. 105 (1967). But this does not mean that the state is free to select any standards it chooses in grant-

ing the vote where the board is elected. As Judge Hays pointed out in remanding this case to be heard by a three-judge court:

> "[T]he Supreme Court has held, 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. Harper v. Virginia Board of Elections, 383 U. S. 663, 665 (1966).'" *Kramer* v. *Union Free School Dist. No. 15,* 379 F. 2d 491, 494 (2d Cir. 1967).

We need not, in this case, decide whether a school board of a New York Union Free School District exercises "legislative" or "executive" powers. In apportionment cases this characteristic seems, for the moment, to be a factor relied upon by the Supreme Court in deciding whether an election is required. *Sailors* v. *Board of Educ.,* 387 U. S. 105, 109 (1967); Sentell, *J.,* Reapportionment and Local Government, 1 Georgia L. Rev. 596, 643 (1967). The distinction has no validity where an important office is filled by a public election and the issue is whether some citizens shall be denied the right to vote. See *Sailors* v. *Board of Educ.,* 387 U. S. 105, 109 (1967) ("since the choice of members of the county school board did not involve an election. . . , the principle of 'one man-one vote' has no relevancy"); *Gray* v. *Sanders,* 372 U. S. 368 (1963). Cf. *Strickland* v. *Burns,* 256 F. Supp. 824 (M. D. Tenn. 1966) (election of county school commissioners from malapportioned districts unconstitutional); *Delozier* v. *Tyrone Area School Board,* 247 F. Supp. 30 (W. D. Pa. 1965) (unconstitutional for directors of school board to be elected from regions with wide disparities in population). See also *Pitts* v. *Kunsman,*

251 F. Supp. 962 (E. D. Pa. 1966) (as a matter of statutory interpretation the composition of an interim school board on a basis other than proportional to district population was improper).

There can be no doubt that the "Equal Protection Clause . . . restrains the states from fixing voter qualifications which invidiously discriminate." *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663, 666 (1966); *Carrington* v. *Rash*, 380 U. S. 89 (1965). The question is whether the objectives of section 2012 and its method of achieving them should be classified as permissible "rational classifications" or as unconstitutional "invidious discriminations."

(a) *Standards in Voting Rights Cases*

States may make reasonable distinctions among their citizens. But their power is greatly circumscribed where the right to vote is involved. Any "alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964). "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry* v. *Sanders*, 376 U. S. 1, 17-18 (1964).

In the field of voting, there is no merit to respondent's contention that qualifications are reasonable if they "rest on real and not feigned differences," and "the distinction have some relevance to the purposes for which the classification is made." *Walter* v. *City of St. Louis*, 347 U. S. 231, 237 (1954) (validity of classification in a city income tax scheme). See also *McGowan* v. *State of Maryland*, 366 U. S. 420, 425-26 (1961) (validity of Sunday closing law).

The traditional test for determining whether a classification is valid under the Equal Protection Clause—rationality

—does not satisfy the requirements of the Clause where the right to vote is concerned. The central importance of this right in our political system recently led the Supreme Court to conclude that "a clearly rational state policy" of apportionment is unconstitutional if "population is submerged as the controlling consideration" in apportionment. *Reynolds* v. *Sims*, 377 U. S. at 581. Such considerations as history, economic or group interests, geography, desire to insure effective representation for sparsely settled areas, accessibility of representatives to their constituents, theories of bicameralism, occupation, balance of urban and rural power, and results of a popular referendum were all rejected as inconsistent with the equal protection requirement of one person-one vote. *Reynolds v. Sims*, 377 U. S. at 622-23 (Harlan, *J.* dissenting).

In dictum the reapportionment decisions have disclaimed the applicability of their strictures to the fixing of voter qualifications. See, *e.g.*, *Gray* v. *Sanders*, 372 U. S. 368, 380-81 (1963) ("Minor felons and other classes may be excluded. . . . But once the class of voters is chosen and their qualifications specified we see no constitutional way in which equality of voting power may be evaded."). But their rationale mandates application of stringent standards in testing the reasonableness of limitations on the franchise. The assumption underlying the reapportionment decisions is that because the right to vote could not be totally denied on the basis of the rational considerations advanced by the states, it could not be even partially denied or diluted on such bases. See *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964) ("It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that otherwise qualified voters had been entirely prohibited from voting"). Thus, denial of the right to vote entirely represents an *a fortiori*

case of dilution of the vote. See *Harper* v. *Virginia St. Bd. of Elections,* 383 U. S. 663, 668 (1966) ("The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote").

Rationality of purpose does not justify denying the right to vote in government elections on important public matters to an adult citizen, morally and intellectually qualified, who meets residence requirements. In two recent cases invalidating state qualifications for voting, the Supreme Court has accepted, in practice, this limitation on state power. *Carrington* v. *Rash,* 380 U. S. 89 (1965); *Harper* v. *Virginia St. Bd. of Elections,* 383 U. S. 663 (1966).

Striking down a provision in the Texas Constitution preventing "[a]ny member of the Armed Forces of the United States" who moved to Texas during military service from voting in any election in the State "so long as he or she is a member of the Armed Forces," the Court rejected the justifications offered—that persons in military service were always subject to reassignment and therefore could not be deemed to be bona fide residents and that there was a danger that the concentrated ballots of military personnel might overwhelm a small civilian community. *Carrington* v. *Rash,* 380 U. S. 89 (1965). The danger of military domination of local elections was an unnacceptable reason for denying the vote to otherwise qualified voters who were members of the Armed Forces because "fear of the political views of a particular group of bona fide residents," cannot be used to deprive them of their right to vote. 380 U. S. at 94. Although acknowledging that "Texas has the right to require that all military personnel enrolled to vote be

bona fide residents of the community," the Court ruled that because some servicemen could in fact acquire bona fide residence while stationed in Texas, the State must "winnow . . . from the ranks of the military those whose residence . . . is bona fide. . . . States may not casually deprive a class of individuals of the vote because of some remote administrative benefit." 380 U. S. at 95, 96.

The Court clearly rejected the rationality standard of the Equal Protection Clause advanced by the defendants in the instant case. As Mr. Justice Harlan's dissent points out, "Texas could rationally conclude" that instances in which military men were residents "would likely be too minimal to justify the administrative expenditure involved" in winnowing them out from the vast majority who were transients. 380 U. S. at 99-100. If the State need only produce "any state of facts [which] reasonably may be conceived to justify" the classification (*McGowan* v. *Maryland,* 366 U. S. 420, 426 (1960)), in order to satisfy the Equal Protection Clause, the Texas provision would have been valid.

In *Harper* v. *Virginia St. Bd. of Elections,* 383 U. S. 663 (1966), the Court declared invalid Virginia's poll tax on the ground that "wealth has no relation to voting qualifications." 383 U. S. at 670. It held that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666.

The dissents of Justices Black and Harlan in *Harper* both persuasively argue that the poll tax could be supported as having a rational basis—the historical belief that those who pay poll taxes are more interested in furthering the State's welfare. But the majority rejected this claim, noting:

> "[w]e have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Id.* at 670.

What showing will support a classification denying the right to vote is unsettled. *Harper* makes any property or wealth qualifications for voting unconstitutional. *Carrington* outlaws a denial of the vote based on fear of the political persuasion of those denied the right and prevents a state from striking a balance against voting rights in favor of administrative convenience. Together with the reapportionment cases, these two cases make it clear that equal protection requires a higher standard for classifications denying or diluting a citizen's vote than has traditionally been required for legislative classifications involving less fundamental political matters.

Lassiter v. *Northampton Cty. Bd. of Elections,* (360 U. S. 45 (1959)) upheld a non-discriminatory literacy test for voting. *But see Cardona* v. *Power,* (384 U. S. 672, 675 (1966) (Douglas, *J.* dissenting)) (constitutionality of a fairly administered literacy test question) *Lassiter* is explicable on the ground that the excluded voters lacked intellectual capacity. This rationale has no bearing on the case before us—plaintiff is a college graduate; here discriminations are based upon whether the voter has property rights or has children attending public schools—criteria having no bearing on intellectual or moral qualifications as a voter. The Supreme Court made it quite clear in *Harper* that:

"Wealth, like race, creed or color, is not germaine to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of property, like those of race . . . . are traditionally disfavored. 383 U. S. at 668.

(b) *Standards Applied to §2012*

(i) *Clearly Arbitrary Distinctions*

We need not go beyond the confines of the standards already articulated in the decided cases to find a number of arbitrary and constitutionally indefensible distinctions made by section 2012. Taking first the case of the plaintiff himself—a childless adult—the statute is in direct conflict with the dictate of *Harper* that "wealth . . . has no relation to voting qualifications," for among the class of all non-parents the statute discriminates between those who own or rent property and those who do not.

Whatever doubt there might be that section 2012 imposes a forbidden property qualification for voting is resolved by an examination of the history of the statute. Originally, section 2012 and its predecessors required the ownership of property and the payment of school taxes as a condition precedent to voting. Periodically, new groups have been given rights to vote in school board elections. Thus, in 1867, parents of school children were given the vote. In 1894, a person in possession under a contract of purchase was given the vote. And in 1956, spouses of property holders were given the vote. The most significant addition to the group of citizens allowed to vote in school board elections was the recent inclusion of renters of residential property. The theory behind this amendment was that inasmuch as renters ultimately paid for school taxes in the form of

higher rent, they had an interest almost the same as homeowners and, therefore, could not be denied the vote. Thus, the addition was nothing more than the recognition that in modern society for many purposes the apartment dweller occupies the same place as the homeowner. *Cf. Landes* v. *Town of North Hempstead*, 20 N. Y. 2d 417, 421, 284 N. Y. Supp. 2d 441, 444 (1967). The statute clearly sets up a property qualification for voting. This is a denial of equal protection.

This same reasoning applies with equal force not only to young adults living with their parents, but to older persons residing with their children, to boarders or lodgers, and to clergy, military, and others living on tax exempt property. Assuming persons in each of the groups mentioned do not have children attending district schools, the only line separating these non-parents from the non-parents entitled to vote is the line of property. If you own or rent property you vote, if you do not, you do not vote.

Such discrimination cannot be justified by arguing that the requirements of owning or renting is designed to enfranchise those with a sufficiently stable interest in community affairs to be expected to exercise the ballot responsibly. *Carrington* v. *Rash*, 380 U. S. 89 (1965). As Chief Judge Fuld, speaking for the New York Court of Appeals in a decision striking down an analogous state law requiring the ownership of property as prerequisite to holding local office, so eloquently put it:

"Ownership of real property does not render one more interested in or devoted to, the concerns of the town. In a society such as ours, characterized by its 'mobility' and 'anonymity' (Cox, The Secular City [rev. ed., 1966], p. 33), a landowner is no more likely to be

permanently established in a town—and, by that token, better qualified to govern—than one who is not a property owner. Examples come readily to mind which demonstrate the unrealistic character of the property qualification: an elected town councilman, suddenly compelled by financial reverses to sell his home and move into an apartment, would be required to resign from office; an apartment dweller who owned a taxpayer in town but who commuted to his place of business in, for instance, New York City and took no interest or part in civic affairs would be fully eligible for town office; and an apartment dweller not owning real property but with a place of business in town and deeply involved in community affairs would be ineligible. All in all, we suggest that it is impossible today to find any rational connection between qualifications for administering town affairs and ownership of real property." *Landes* v. *Town of North Hempstead*, 20 N. Y. 2d 417, 421, 284 N. Y. S. 2d 441, 444 (1967).

The grant of the right to vote to spouses of property owners but not to spouses of property renters is an invidious discrimination with no justification. The statute recognizes that homeowners and apartment dwellers have virtually identical interests in the outcome of school board elections but does not recognize that spouses of apartment dwellers have the same stake in the outcome of the elections as spouses of apartment dwellers. The discrimination is easily circumvented—all that need be done is to have both husband and wife sign the lease and both are then entitled to vote under the statute. But the fact that the provision is little more than a trap for the unwary does not provide constitutional justification.

Taking next the class of all non-property holders who are parents, the statute again makes constitutionally impermissible distinctions. The statute disenfranchises parents whose reason for sending their children to private schools is that the public schools are inferior; they may have a great interest in seeing the public schools improved so that they can avoid the burden of private tuition, yet they are denied a voice in school decisions. Parents with a child about to finish high school will have a vote in the running of school affairs, but the parent with a child about to enter school will not.

(ii) *Overall Scheme Improper*

Despite the "crazy quilt" of arbitrary and impermissible distinctions made by the statute, it is urged that the overall scheme is based on the rational policy of attempting to limit the right to vote to the patrons of the school district—the parents and the taxpayers—and that any minor disenfranchisements occasioned by this rational policy cannot be used to overturn it.

No statistics have been furnished indicating how many otherwise qualified citizens are denied the right to vote in school board elections, but it seems safe to assume that the number is substantial. Even if the number were small, this would not justify arbitrary and discriminatory legislation. A statute which denied the right to vote to redheads would be no less unconstitutional because there was only one redhead in the community. So, here, the arbitrary discrimination cannot be justified on the ground that only a few citizens are denied a fundamental right.

Even if we assume that an overall rational policy need not fall because it works hardship in "isolated" instances,

the scheme of section 2012 does not meet the exacting standards demanded by the Equal Protection Clause when the right to vote is involved. The "rational policy" on which defendants rely is that restriction of the vote to the children attending the district's schools and resident taxpayers allows only those who use and pay for the schools to determine its policies.

In defendants' view such limitation has no more constitutional significance than a provision allowing only those assessed for sewer or water district expenses to vote in such special district elections. What has already been said about the importance of local educational policy makes unpersuasive an attempt to equate school districts with sewer districts.

The plain and simple truth known to every suburban resident is that plaintiff and those similarly situated are directly affected by, and do pay for, local schools. The school system does have a pervasive influence on their lives. The Equal Protection Clause, therefore, requires that they be accorded the same electoral voice as any of their neighbors. The argument that the vote in school board elections is a local matter not of sufficient moment to be given the same preferential treatment as the right to vote for state legislators is unrealistic and must be rejected.

(c) *Inadequacy of the Legislative Remedy*

It is no answer to plaintiff's prayer for relief that section 2012 is a matter of state law and that plaintiff may cast his vote for members of a properly apportioned state legislature, using his voting influence to seek repeal. Nor is it an adequate response to assert that if plaintiff does not like the way his federal, state or county tax dollar is being spent by the local school board, he can vote in federal,

state and county elections to express his objections. A person denied constitutional rights need not appeal to a majority of voters for redress. As the Supreme Court put the matter in *Lucas* v. *Forty-Fourth Gen. Assem. of Colo.*, 377 U. S. 713 (1964):

> "While . . . a court of equity might be justified in temporarily refraining from issuance of injunctive relief . . . in order to allow for resort to an available political remedy . . . individual constitutional rights cannot be deprived, or denied judicial effectuation, . . . because of the existence of a nonjudicial remedy. . . . An individual's constitutionally protected right to . . . vote cannot be denied . . . by . . . [the] majority of . . . [the] State's electorate. . . ." *Id.* at 736.

Consistent with the principles of limited delay to seek political redress expressed in *Lucas*, the Court might have been justified in awaiting the decision of the voters of the State on the proposed 1967 New York State constitution which would have outlawed the qualification for voting in section 2012. Proposed New York State Constitution, Art. II, §1 (1967). But the voters have rejected that proposed constitution. The time for delay has passed.

In any event, it is by no means clear that plaintiff has an effective political remedy in the state legislature. Although plaintiff is entitled to vote for representatives in a fairly apportioned legislature, the statutory scheme under the New York Education Law strips plaintiff of many potential allies in his quest for an equal voice in school matters. Section 2012 applies only to approximately one-third of the school districts in New York State. In the remaining districts, either the school board is appointive and a citi-

zen's control over the board is exercised by his vote for the mayor who appoints the board or all citizens enjoy the vote. In the districts in which section 2[illegible]2 applies, most citizens—owners of real property, apartment renters, and parents—are entitled to vote. Thus, in seeking an amendment, plaintiff would be forced to rely on the good will of a majority disinterested in his problem or opposed to any dilution of its own voting power. In attempting to alter allocation of any federal, state or county funds appropriated for education, plaintiff will lack support of other voters because most citizens already enjoy voting participation on the school board level and have power to determine how public school funds are spent.

2. *First Amendment Issues*

The New York statute appears to be unconstitutional on other than equal protection grounds. First, it discriminates against some parents because of their religious beliefs by denying them the right to vote solely because they choose to send their children to parochial or other private schools rather than to public schools. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). A wife of a lessee of real property can vote if her children go to public school but not if they go to private—in the main parochial—school. Second, it limits the effective power of non-voters in an important mode of expression and association. *NAACP* v. *Button*, 371 U. S. 415, 429-33 (1966). Local school boards often pass resolutions directed to the state asking for new aid for educational programs and to the county with respect to the other forms of aid; recently they took public positions on the widely debated issue of repeal of Section 3 of Article XI of the New York State Constitution dealing with aid to parochial schools. Inability to vote and influence such

school board resolutions reduces power to influence important action by the state. Since the parties have not presented these issues we need not decide them at this preliminary stage on a motion to dismiss. *Cf. NAACP* v. *Button, id.* at 444.

B. *Claim Under the State Constitution*

Even if section 2012 could be thought to comply with the Equal Protection Clause of the Federal Constitution, it probably cannot withstand attack under the New York State Constitution. Lower New York courts have held that section 2012 does not violate the State Constitution. *Turco* v. *Union Free School Dist. No. 4*, 251 N. Y. S. 2d 141, 43 Misc. 2d 367 (Sup. Ct. 1964), *aff'd*, 256 N. Y. S. 2d 553, 22 App. Div. 2d 1018 (2d Dep't 1964). Nevertheless, a recent Court of Appeals case striking down property qualifications for town office as an unreasonable classification and as an impairment of the voter's right to a wide choice of candidates strongly suggests that New York's highest court is ready to find that New York's Constitution outlaws property qualifications for voters. *Landes* v. *Town of North Hempstead*, 20 N. Y. 2d 417, 284 N. Y. S. 2d 441 (1967).

The Court of Appeals in *Landes* declared:

> "Turning . . . to the plaintiff—along with other residents of the town—as voter, the proscription against nonlandowners as town councilmen amounts to a 'dilution' or 'debasement' of the vote not unlike that occasioned by the malapportionment which the Supreme Court has held violative of the equal protection clause. . . .

> The statutory restriction also violates section 1 of article 1 of the State Constitution which provides that 'No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof'. Wide latitude in choosing public officers is among the rights secured by this constitutional provision. In effect, it vests electors with the right to choose public officers 'on whatever principle or dictated by whatever motive they see fit, unless those motives contravene common morality'. . . . The denial of such a right to electors on property grounds becomes more egregious today, when a large proportion of the population in many towns, especially in suburban areas, are apartment house dwellers. Moreover, we know from experience that it is often the wife who holds record title to a home or other property and that, with increasing frequency, owners of real property have occasion to place the record ownership in real estate investment trusts or syndicates." 284 N. Y. S. 2d at 444-445 (footnote omitted).

Section 2102 of the Education Law provides that a school district officer must be a "qualified voter of the district." This provision, which incorporates the property requirement of section 2012 by reference, seems to be unconstitutional under the *Landes* test. *But cf.* statement of Attorney General of New York, N. Y. L. J., Jan. 19, 1968, p. 1 (*Landes* requires elimination of property qualification in Town and Village laws but not in Education law because parents without property and renters can vote). If section 2102 must fall it seems unlikely that 2012—whose terms cause the infirmity—can stand under New York law.

Having jurisdiction by virtue of the substantial federal question raised in the complaint, this Court has power to

decide state issues arising out of the pleadings. *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 721-29 (1966); *Hurn* v. *Oursler*, 289 U. S. 238 (1933); *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909).

Although ordinarily a federal court would decide a case on a dispositive state ground in order to avoid a constitutional dispute, the nature of the issues in this case make that rule inapplicable. Here, the answer to the federal constitutional question seems clear while the decision on the state ground would be based largely on an extrapolation of a single case. In these circumstances, the Court should place primary reliance on the federal ground.

The suggestion that this Court should abstain in order to let the state courts clarify state law and possibly avoid the federal constitutional question is unacceptable. In the context of the deprivation of fundamental rights, the federal courts should not abdicate their power to redress such important wrongs. See *Zwickler* v. *Koota*, 88 S. Ct. 391 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); Note, Federal-Question Absention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604 (1967).

Conclusion

Viewed either as a matter of federal or state constitutional law, a claim that section 2012 is invalid is supportable. The motion to dismiss should be denied.

Dated: Brooklyn, New York
March 14, 1968

Jack B. Weinstein
U.S.D.J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 258

MORRIS H. KRAMER,

Appellant,

—v.—

UNION FREE SCHOOL DISTRICT NO. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

MORRIS H. KRAMER,

Appellant,

—v.—

UNION FREE SCHOOL DISTRICT No. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the Eastern District of New York entered on March 14, 1968, holding Sec. 2012 of the New York Education Law constitutional and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The majority and dissenting opinions of the United States District Court for the Eastern District of New York are not yet reported. They are set out in the Appendix, *infra*, pp. 1a-35a.

Jurisdiction

This suit was brought under 42 U. S. C. §§1981 and 1983 and 28 U. S. C. §§1343 and 2281. The judgment of the three-judge District Court was entered on March 14, 1968 and Notice of Appeal was filed on April 4, 1968. On May 24, 1968, Mr. Justice Harlan extended the time within which to file this Jurisdictional Statement to and including July 3, 1968. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Baker* v. *Carr*, 369 U. S. 186 (1962); *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Sailors* v. *Board of Education*, 387 U. S. 105 (1967).

Question Presented

Whether Section 2012 of the New York Education Law, which denies appellant his right to vote in School District Elections, violates the Equal Protection Clause of the Fourteenth Amendment, and the First Amendment as made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

Statute Involved

Section 2012, New York Education Law:

"A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is: 1. A citizen of the United States. 2. Twenty-one years of age. 3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

(a) Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase of, real property, in such district liable to taxation for school purposes, but the occupation of real property by a person as lodger or boarder shall not entitle such person to vote, or

(b) Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

(c) Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting. No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section."

Statement[1]

Appellant, Morris H. Kramer, a college graduate, is a twenty-eight year old bachelor who resides in the private home of his parents located in Atlantic Beach, New York, within the confines of School District No. 15. He has lived with his parents for many years, and he has voted in federal and state elections since 1959. He is not a property owner, a lessee, or a parent with school-age children. On April 25, 1965, he attempted to register in the forthcoming school district election, but his application was rejected by appellees on the ground that he failed to meet the special voter qualifications set forth in Section 2012.

After suit was filed below, the District Court denied appellant's motion to convene a three-judge court and dismissed the complaint. 259 F. Supp. 164. On appeal to the Court of Appeals, the Court reversed and remanded, ordering that a three-judge court be convened. 379 F. 2d 491.

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[1] The statement of facts, none of which are in dispute, is taken verbatim from the majority opinion below.

The Question Is Substantial

Section 2012 is designed to restrict the class of persons who may participate as voters in the affairs of Free School Districts. Those affairs include passing upon the proposed school budget (Sec. 2021, New York Education Law), levying taxes (Sec. 2022, New York Education Law), and election of the members of the Board of Education (Secs. 1701, 2102(2), 1702, New York Education Law).

Section 2012 enfranchises only three general classes: real property owners and their spouses; lessees (excluding spouses); parents and guardians of children attending district schools.[2] In addition to the disenfranchisement of appellant, a twenty-eight year old bachelor who lives in a home owned by his parents, the following classes are also deprived of the right to participate in Free School District affairs: boarders and lodgers; elder citizens and others living in the homes of their children and other relatives; spouses of lessees; parents not owning or renting homes whose children attend private or parochial schools, or whose children attend special public schools outside the district, or whose children are too young to attend public schools; and clergy, military and others living on tax-exempt property.[3]

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[2] Other states have similar restrictions. For example, Sec. 33-404, Idaho Code, confines electors "in any school election" to parents or guardians of children under twenty-one years, and to taxpayers "on real or personal property" and their spouses.

[3] These restrictions are to be compared with the qualifications for voters in general elections as set forth in Article 2, Sec. 1, New York State Constitution, which only requires that voters be twenty-one years old and shall have resided in the state and county, city, or village for three months preceding an election.

The majority of the court below found Sec. 2012 "rational" on the ground that it regulates "a local election on limited issues as to which certain local residents have a far greater direct interest than others" (App. *infra*, p. 9a). The stated justification by the court below rests upon the constitutionally impermissible assumption that citizens can be deprived of their right to vote in the absence of a demonstrable concrete interest in the subject matter of the election. This doctrine offends not merely the equal protection clause of the Fourteenth Amendment,[4] but also distorts the First Amendment, for as was said in *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964), "The right to vote freely . . . is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." See also *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

Judge Weinstein, dissenting below, recognized and described the constitutionally capricious classification scheme embodied in Sec. 2012:

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[4] The Equal Protection Clause applies of course to unconstitutional restrictions upon the franchise, *Harper* v. *Board of Educations*, 383 U.S. 663 (1966); *Morgan* v. *Katzenbach*, 384 U.S. 641 (1966), as well as to the more obvious case of complete denial of the franchise, as in the case at bar. *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Mabry* v. *Davis*, 232 F.Supp. 930 (W.D. Tex. 1964). Nor is there any question of the application of the Equal Protection Clause to local governing bodies, particularly where, as in the case at bar, they are established by state legislative action. *Avery* v. *Midland County*, 88 S.Ct. 1114 (1968). While *Avery* was concerned with general county government, the application of the Equal Protection Clause to school districts is established at least since *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Furthermore, the functions of the appellees here are almost identical to those of the Midland County government in the *Avery* case—setting a tax rate, equalizing assessments, issuing bonds, proposing and adopting a budget.

> "An important characteristic of our political system is the difussion of power among various levels of government. Local school boards exercise a very considerable portion of that power. Thus, a citizen excluded from participation or control of this locus of governmental force is deprived of a significant degree of control over the total government of this nation" (App., *infra*, p. 13a).

Judge Weinstein goes on to demonstrate explicitly the foundation of this general proposition. He discusses the importance of education in a democratic society, the centrality of the educational system to political activity in the suburbs, the importance to appellant of the cost of education,[5] and the importance of the non-fiscal aspects of educational systems. Notwithstanding the general importance of appellant's interest in Free School District affairs, the majority below found that Sec. 2012 established rational criteria, but the rationality standard where voting is concerned was rejected in *Carrington* v. *Rash*, 380 U.S. 89 (1965). See also *Harper* v. *Virginia State Board*, 383 U.S. 663 (1966).

Though the States need not necessarily provide for election of school boards, see *Sailors* v. *Board of Education*, 387 U.S. 105 (1967), the substantial federal question in this case is whether, having provided for elections, it may pick and choose among otherwise qualified electors to determine who may have a vote.[6] This question having been answered

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[5] A substantial portion of the appellees' funds come from the state (App., *infra*, pp. 16a-18a) which petitioner supports through taxes.

[6] "It may be true, as the appellees argue, that the state need not permit its citizens to vote on the matter with which Section 2012

negatively in *Carrington,* should be explored again in this case in order to determine the power of the States to abridge the right to vote by requiring a citizen to show his "interest" in the election.

Respectfully submitted,

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July 2, 1968

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is concerned. See Sailors v. Board of Education, supra. However, as the Supreme Court has held, 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.' Harper v. Virginia Board of Elections. . . ." *Kramer* v. *Union Free School District No. 15,* 379 F.2d 491 (2nd Cir., 1967).

APPENDIX

Majority Opinion of the United States District Court, Eastern District of New York

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MORRIS H. KRAMER,

Plaintiff

—against—

APPENDIX

UNION FREE SCHOOL DISTRICT NO. 15, RAYMOND S. BARON, JESSE CHETOW, RALPH J. FERRI, J. GIBSON FRUIN, HAROLD DURAN, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Defendants

MOORE, *Circuit Judge*:

This is a class action in which plaintiff seeks to have a state statute declared unconstitutional and its enforcement enjoined. The complaint, asserting federal jurisdiction under 42 U. S. C. §1981 and 1983 and 28 U. S. C. §, brought on behalf of plaintiff and others similarly situated to have this court declare §2012 of the New York Education Law[1] unconstitutional because it denies them equal

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[1] Section 2012, Education Law of New York State:

"§2012. Qualifications of voters at district meetings.

A person shall be entitled to vote at any annual meeting for the election of school district officers, and upon all other such

[illegible] to be explored again in this [illegible] the power of the States to [illegible] by requiring a citizen to show [illegible] in the election.

Respectfully submitted,

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[illegible] [illegible] Sailors v. Board of Education, supra. However, as the Supreme Court has held, 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.' Harper v. Virginia Board of Elections, [illegible] *Kramer v. Union Free School District No. 15*, 376 F.2d 431 (2nd Cir., 1967).

APPENDIX

Majority Opinion of the United States District Court, Eastern District of New York

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MORRIS H. KRAMER,

Plaintiff,

—against—

UNION FREE SCHOOL DISTRICT NO. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Defendants.

MOORE, *Circuit Judge*:

This is a class action in which plaintiff seeks to have a state statute declared unconstitutional and its enforcement enjoined. The complaint, asserting federal jurisdiction under 42 U. S. C. §§1981 and 1983 and 28 U. S. C., is brought on behalf of plaintiff and others similarly situated to have this court declare §2012 of the New York Education Law[1] unconstitutional because it denies them equal

---

[1] Section 2012, Education Law of New York State:

"§2012. Qualifications of voters at district meetings

A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other mat-

protection of the laws and a republican form of government in violation of the Fourteenth Amendment and Article 4, Section 4 of the Federal Constitution. More specifically, he requests that a judgment be entered declaring §2012 to be unconstitutional, that a permanent injunction be issued against defendants from enforcing said Section; and that defendants submit a plan whereby plaintiff and others similarly situated be allowed to register in future school board elections.

The defendants are the Union Free School District No. 15, Cedarhurst, New York, and members of the Board of Education thereof.

The facts alleged in substance are:

Plaintiff, Morris H. Kramer, a college graduate, is a twenty-eight-year-old bachelor who resides in the private

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ters which may be brought before such meeting, who is: 1. A citizen of the United States.

2. Twenty-one years of age.

3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

a. Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase of, real property in such district liable to taxation for school purposes, but the occupation of real property by a person as lodger or boarder shall not entitle such person to vote, or

b. Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

c. Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting.

No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section."

home of his parents located in Atlantic Beach, New York, within the confines of District No. 15. He has lived with his parents for many years, and he has voted in federal and state elections since 1959. He is not a property owner, a lessee or a parent with school-age children. On April 25, 1965, he attempted to register in the forthcoming school district election, but his application was rejected by defendants on the ground that he failed to meet the special voter qualifications set forth in Section 2012.

On March 4, 1966, defendants moved to dismiss the complaint (1) for lack of subject matter jurisdiction, and (2) for failure to state a claim. On March 17, 1966, plaintiff moved to convene a three-judge court to hear and determine the alleged constitutional issue.

The district court denied the motion to convene a three-judge court and granted defendants' motion, dismissing the complaint on the merits, 259 F. Supp. 164, E. D. N. Y. A petition for a writ of mandamus to direct the convocation of a three-judge court was denied by the Supreme Court sub nom. *Davis* v. *Union Free School District No. 7,* 385 U. S. 807 (1966).

On appeal to the Court of Appeals, the Court in three separate opinions, one a dissenting opinion, reversed and remanded, 379 F. 2d 491 (1967). Judge Hays in his opinion held that there was "a constitutional claim of sufficient substance to require that a three-judge court be convoked." Judge Kaufman concurred because he could not "conclude that appellant's challenge to §2012 of the New York State Education Law is 'insubstantial' ", but warned against any inference therefrom that he viewed "appellant's claim as being meritorious" (p. 495). Chief Judge Lumbard dissented on the ground that the claim was "so patently with-

out any merit" and that the constitutional issues were "insubstantial."

As a result of the remand by the Court of Appeals, the responsibility of this three-judge court is to hear and determine whether Section 2012 is unconstitutional. Such hearing has been held, and the parties have submitted by reference the briefs in the case before the Court of Appeals as well as supplementary briefs.

Less than one-third of the local school systems in the State of New York are organized as Union Free School Districts under the statute which nevertheless represents a statewide policy.[2] The voters in such districts who have qualified under §2012 may attend the district meetings which are held at least once a year (N. Y. Ed. L. §2002). At such a meeting they approve the school budget and vote to levy the taxes on taxable real property in the school district necessary to meet the expenses for the coming year. See N. Y. Ed. L. §§2021, 2022. The voters in each school district also elect from their number three to nine Trustees who act as the Board of Education. See N. Y. Ed. L. §§1701, 2101(2), 1702. The Board of Education is the body which prescribes the course of study to be followed in the district schools, decides on the text-books, purchases or builds schools (when authorized at a meeting), hires teachers, and makes other educational policy decisions. See N. Y. Ed. L. §1709. While the Board of Education generally cannot spend more money than is appro-

[2] Section 2012 is not applicable to city school districts in New York, Buffalo, Rochester, Syracuse, Yonkers and Albany and in cities with less than 125,000 population. In those cases the Board is appointed by the Mayor and/or Council (New York Education Law §§2531, 2553(2)) and the population of those districts exceeds two-thirds of the population of the state.

priated at the district meeting (§1718), it has the sole power to set teachers' salaries (§2022) and it can pay teacher salaries and "ordinary contingent expenses" even if the voters neglect or refuse to appropriate money to cover the same (§2023). Additional funds to cover the cost of operating the district school systems may be received from the federal and state governments.

In making this attack the plaintiff in addition seeks to invalidate the statute upon the ground that it also denies voting rights to others not in his class. Although such expanded representation would not strengthen his claim, it is appropriate to point out that plaintiff is not in a position, either individually or by his class action, to represent members of other classes not similarly situated. "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of a third party. Reference to this rule is made in varied decisions" (*Barrows* v. *Jackson,* 346 U. S. 249, 255 (1953)); *Mapp* v. *Board of Education of City of Chattanooga, Tenn.,* 319 F. 2d 571 (6 Cir. 1963); *Thaxton* v. *Vaughn,* 321 F. 2d 474 (4 Cir. 1963); 3A Moore's Federal Practice §23.07(2) at 3427 (2d Ed. 1967); see also, *Hamer* v. *Campbell,* 358 F. 2d 215 (5 Cir. 1966); *Nesbit* v. *Statesville City Board of Education,* 232 F. Supp. 288 (W. D. N. C. 1964), *decision vacated,* 345 F. 2d 333 (4 Cir. 1965); *Carroll* v. *Associated Musicians of Greater New York,* 316 F. 2d 574 (2 Cir. 1963).

The Legislature of the State of New York, in the statute here under attack, has limited the franchise in Union Free School District elections to those district residents who, it believes, have a direct interest in the administration of the school system because they are either real estate taxpayers (or renters of taxable real estate) and thus

carry the burden of paying for a major share of the services provided by the school districts, or because they are directly involved as parents of pupils attending the schools in question. Specifically, three groups are enfranchised by §2012:

(a) School district residents who own taxable real property, and their spouses,

(b) School district lessees, but not their spouses,

(c) Parents or guardians of children attending district schools.

Among the groups not enfranchised by the statute are adults such as plaintiff who reside in family homes. (See also §2012(3)(a): "the occupation of real property by a person as lodger or boarder shall not entitle such person to vote.") Plaintiff argues that this is a discrimination based on property or wealth and as such is a denial of equal protection of the laws in violation of the Fourteenth Amendment.

Plaintiff places much emphasis on *Harper* v. *Virginia Board of Education,* 383 U. S. 663 (1966), in which the United States Supreme Court held Virginia's poll tax to be unconstitutional. In broad terms the Court stated that "it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment" (383 U. S. at 665). The Court also there said: "we conclude that a state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth

nor to paying or not paying this or any other tax. . . . the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process" (383 U. S. at 666, 668).

Thus, the Court, while conceding a State's power to fix voter qualifications, held that wealth was not a proper standard for qualification in general elections. Of a similar character is the recent New York Court of Appeals decision in *Landes* v. *Town of North Hempstead,* 20 N. Y. 2d 417, 284 N. Y. S. 2d 441, 231 N. Y. 2d 120 (1967). There the plaintiff, a duly designated nominee of the Democratic party for the office of councilman, brought the action to have declared unconstitutional sections of the New York Town Law which required a holder of an elective town office to be an owner of record of real property within the town. The plaintiff did not then own property, having transferred title to his home to his wife. The court held the statute unconstitutional because it found that insofar as over-all town government was concerned, the property qualification was unrealistic and "that it is impossible today to find any rational connection between qualifications for administering town affairs and ownership of real property." The court recognized that a large proportion of the population in many towns, especially in suburban areas, are apartment house dwellers and that such a statute would make ineligible for the position of councilman an otherwise well qualified candidate merely because real property was not registered in his name.

All parties are in accord that statutes passed by a state legislature carry with them a presumption of validity, and that the classifications made in such enactments will not be

struck down unless they make invidious discriminations, are patently arbitrary or are irrelevant to the achievement of the state's objective, *Carrington* v. *Rash*, 380 U. S. 89 (1965); *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961); *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 50-51 (1959); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 527 (1959). The defendants argue that it is not unreasonable for the legislature to determine that the local school system should be run by those who have a direct interest in it, namely, those who have to pay for it and those who benefit from its services. We are of the opinion that this argument is well taken when applied to the narrow issue before us—the denial of the franchise to those school district residents whose interest in educational policy and the financing thereof is at best indirect and weak, compared to the concern of those who are franchised.

The Supreme Court in *Harper* has held, in effect, that everybody is affected by, and directly interested in, a general election; both the rich and the poor should have an opportunity to vote for those who will govern them. In *Landes* v. *Town of North Hempstead, supra*, the New York Court of Appeals has said that property considerations should not control elections for councilman, because the decisions reached by those bodies (despite the "local" nature of the issues) directly affect all the residents of the village. However, it is not inconsistent with this principle to hold that the states may require those seeking to vote on school policy to have a direct interest or stake in the issues to be decided and to exclude those who do not. Plaintiff has not indicated that any decisions reached by those assembled at the district meeting or by the Board of Education for the district will affect him in any way. His argu-

ment is that the vote is given to owners and lessees of property; ergo, it must be given to him as well. This argument fails to take into consideration the difference between the situations before the courts in *Harper* (a general state election) and *Landes* (a general town election) and the situation before this court (a school district election). The latter is a local election on limited issues as to which certain local residents have a far greater direct interest than others.[3] The Supreme Court has recently noted that a school board "performs essentially administrative functions; and while they are important, they are not legislative in the classical sense." *Sailors* v. *Board of Education of the County of Kent*, 387 U. S. 105, 110 (1967). The difference in the type of election involved makes the voter qualifications of §2012 "rational" and within the limits of the State's power to fix them.

The quality of public education is controlled in large part by the personal interest of those members of the community who are most vitally affected thereby. The group most interested should be the parents. The effective participation by their offspring in coping with the problems of the next generation will be influenced by the strength of their educational foundation. Good education, however, is more than a metaphysical concept; it must be implemented, particularly in this age of rapidly expanding technology, in all fields, with modern buildings and faculty. The geographic areas in which the Section 2012 school districts function differ substantially from those of the large cities where there are no Board of Education elections. In the smaller

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[3] Property ownership, it should be noted, is only one of several alternative conditions which the Legislature has chosen as indicia of direct interest in the local school system.

communities, there should be found a greater identity of interest with education on the part of the parent and taxpayer groups, the parents because of their supervision over their children, and the taxpayers because of their responsibility for the school capital and operating budgets. Persons in plaintiff's category obviously do not have the same permanency of attachment or interest in the school district as those in the other categories. It is suggested in support of plaintiff's claim, that the court take judicial notice of certain background conditions, social, political and economic, including the impact of the Board's fiscal decisions upon the price of goods and services and certain non-property taxes, all of which it is alleged indirectly affect plaintiff.[4] Apart from the questionable propriety of taking judicial notice of some of these vague generalizations, those factors only suggest possible effects which peripheral activities of the school system might have on plaintiff. However, schools are erected and operated primarily for the education of children, and parents and those closely allied to the community by leases or property ownership are obviously the most interested and affected. The right of suffrage may be limited where the rationale of the exclusion is so directly related to the objective to be achieved. See *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45 (1959); *Pope* v. *Williams*, 193 U. S. 621 (1904). Therefore, the Legislature, in acting within its

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[4] "But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*" (*Lochner* v. *New York*, 198 U. S. 45, 76 (1905)) and the payment of non-property local taxes or other indirect taxes affords plaintiff no standing to attack the statute or any basis for a voice in the election of members of the school board. *Doremus* v. *Board of Education*, 342 U. S. 429, 433 (1952); *Thomas* v. *Gay*, 169 U. S. 264, 276 (1898).

power to fix voter qualifications, did not discriminate in an unreasonable or unrealistic manner. Quite to the contrary, the selection of the parent and taxpayer groups definitely would appear to be within the permissive limits of power still preserved by state legislatures as specified both by the Supreme Court and the New York Court of Appeals.

Plaintiff's reliance on the Guaranty Clause is without merit as it does not present a justiciable issue. See *Baker* v. *Carr*, 369 U. S. 186, 222-29 (1962).

Complaint dismissed.

/s/ LEONARD P. MOORE
U. S. D. J.

/s/ JOHN R. BARTELS
U. S. D. J.

Brooklyn, New York.

March 14, 1968.

Dissenting Opinion of the United States District Court, Eastern District of New York

Section 2012 of the New York Education Law permits the great majority of citizens—resident property holders and lessees of apartments and parents of children attending the district's schools—to vote in elections of Union Free School Districts. Disenfranchised by the statute are the following groups of otherwise qualified voters:

1. young adults such as plaintiff residing in family homes;
2. boarders and lodgers;
3. elder citizens and others living in the homes of their children or other relatives;
4. spouses of persons renting homes;
5. parents not owning or renting homes whose children attend private or parochial schools;
6. parents, not owning or renting homes, whose children attend special public schools outside the district;
7. parents, not owning or renting homes, whose children are too young to attend public schools; and
8. clergy, military, and others living on tax exempt property.

The state's defense of section 2012 is predicated on the hypothesis that if a person neither has an offspring who attends public school nor pays a school tax, he does not possess an interest in school board elections sufficient to entitle him to vote. For reasons indicated below, the state's

assumption is unacceptable. An important characteristic of our political system is the diffusion of power among various levels of government. Local school boards exercise a very considerable portion of that power. Thus, a citizen excluded from participation in control of this locus of governmental force is deprived of a significant degree of control over the total government of this nation. Accordingly, pursuant to the mandate of the Equal Protection Clause of the Fourteenth Amendment, the motion to dismiss should be denied. Alternate grounds for sustaining the complaint are that it states a valid claim under the First Amendment and under the New York State Constitution.

The facts alleged must be construed in light of the social, political, and economic milieu in which the challenged statute operates. While these background conditions are not mentioned in the complaint, on a motion to dismiss for failure to state a cause of action, a court must give the pleader every reasonable benefit of potential proof and plausible inference. Its power—and its obligation—to take judicial notice is necessarily broad. This heightened sensitivity to the realities of our society is particularly important in a case involving public issues and claims of constitutional deprivation.

I. Significance of Local School Board Elections

An analysis of the role of education in America, particularly in the communities where section 2012 applies, demonstrates the great importance of the right asserted by plaintiff. Disallowance of the franchise in school board elections is a denial of equal power to control the expenditure of the major portion of locally raised funds and a substantial amount of state and federal money; it is a refusal of a

voice in the administration of adult education, recreation, library, and cultural enrichment programs which play an important role in the daily lives of citizens of voting age; it is a preclusion of effective participation in the decisions which determine the character and quality of the local community. It is, in short, a deprivation of one of the basic incidents of citizenship. No adult deprived of these rights, privileges and opportunities has the same stature and legal significance as those who enjoy them.

A. *Importance of Education in a Democratic Society*

An educational system constitutes a modern society's crucial genes. By shaping the minds and attitudes of the young, it determines their individual and collective future. Only through excellent schools and teachers can a democracy such as ours achieve the equality of opportunity and the informed electorate vital to its existence. In this country, the concern with education manifests itself in large sums of public and private money expended, in strong feelings of our citizens about current educational issues, and in studied attempts to preserve local control.

Last year the total expenditure on education in United States public and private schools was over fifty billion dollars, about seven percent of our gross national product. Approximately thirty billion dollars was spent for primary and secondary education in public schools. When the time of enrolled students, who number almost sixty million, is considered, education is clearly the predominant constructive activity of this nation.

Headlines daily furnish examples of the deep passions stirred by debate on control of educational policy. One of the substantial pressures on peaceful race relations has

come from the problems created by integration of schools. In the North as well as the South, people have at times abandoned the ballot and the courts and taken to the streets in an attempt to settle these problems. The right to vote in school board elections is the right to participate in attempts at controlling deep currents in our society which can nurture or destroy.

Control of American education remains primarily in local hands. Demands for further decentralization are being pressed. See, *e.g.*, Report of the Mayor's Advisory Panel on Decentralization of the New York City Schools ["Bundy Report"] (1967); Buder, Demands for Local Control Grow, New York Times, Jan. 12, 1968, p. 49, col. 4.

B. *Importance of Education in Suburban Communities*

Nowhere in the United States is greater significance attached to education than in the suburban communities in which section 2012 applies. The recent exodus from city to suburb has been due in large measure to the desire of parents to see their children educated in the best possible schools. At the very least, the quality of these schools has been a consideration weighed heavily by those who must choose in which suburb to settle. A striking example of the effect that a school system can have on a community was given by counsel for defendants on oral argument. He cited a recent incident in which a large industrial plant was established in Pennsylvania rather than in New York State because management personnel, scientists, and technicians were unwilling to subject their children to the inferior educational system available at the proposed New York cite.

Moreover, in suburbia the local school system is a focal point for the political energies of the adult population. In

an increasingly complex mass society, a local school board election may provide the major outlet for the political drives of residents who see in it an opportunity for effective, tangible and meaningful political action. Even on state and national political issues the suburban schools are of great importance, for it is in the school buildings that many of the debates and meetings are held.

Together with adult education programs, concerts, and theatre presentations held in the schools, such political discourse constitutes an important part of intellectual life outside our major cities. The local school board, by encouraging or discouraging use of school buildings for these purposes can have a significant effect on the adult community's intellectual and political characteristics.

C. *Importance of Cost of Education to Plaintiff*

The amount of money spent annually on education by both the private and public sectors of our economy is steadily increasing. The decisions reached by local school boards have an impact on the fiscal decisions of every level of government. Denial of the right to vote for school boards which administer these funds deprives plaintiff—a federal, state and county taxpayer—of the degree of control over the expenditure of this tax money enjoyed by those entitled to vote on school matters.

The federal government is involved in poverty programs like "Head Start," which are administered by local communities, in National Defense Education Act and other loan programs, and in direct aid to state and local school systems. Federal participation in programs of the Department of Health, Education and Welfare (H. E. W.) aiding education amounted to almost four billion dollars last year. An additional nine and one-half billion dollars was al-

located by the 90th Congress to fund H. E. W. programs designed to aid education over the next two years.

The state is also a major source of funds for local schools. In his 1968 budget message to the New York Legislature, the Governor of New York summarized the scope and impact of state aid to local schools as follows:

> "With the increases I propose, total aid to local communities to help pay the cost of primary and secondary education will amount to about $1.8 billion—approximately 36 per cent of the current revenue anticipated by the state in the 1968-69 fiscal year. The added aid included in my budget for primary and secondary education will consume more than 58 per cent of the revenue expected from the tax increases that I propose, and be a *significant factor in helping to hold down local property taxes.*" (Emphasis supplied.)

The fact that a citizen does not pay local school property taxes does not mean that he is not affected by school budgets. In the first place, the level of taxation in a local community influences the price of goods and services. In the second, as school taxes based on property increase, so do the pressures to reduce property taxes levied by the village, town, and county. Thus, decisions on school budgets can have a major impact on the administration of the other local units of governments which affect the daily lives of citizens like plaintiff. Finally, the structure of local government mandates that it is the county, towns and villages which bear the responsibility for much of the expense attributable to school district activities.

A study of the current budget for Nassau County, in which plaintiff resides, is instructive. School real estate

taxes are based on property assessments by the County Board of Assessors, whose expenses are paid from County taxes. Town Receivers of Taxes, whose staffs are paid from town taxes, collect school district taxes. For 1967-68, these school taxes amounted to over two hundred and thirty-eight million dollars. Together with the costs of collecting the taxes and other county government expenses for education —maintenance of a vocational educational program and a community college—these sums amount to fifty-two percent of all the monies raised in Nassau County from real property taxes.

County government tax revenues are partly based upon non-property taxes—including special taxes on pari-mutuel betting, permit and license fees, fines and forfeitures, and departmental revenues (and sales taxes in some parts of the state). These non-property local taxes which help support local education are paid by plaintiff and citizens similarly situated. Moreover, zoning and the construction of roads, parks and other county, town and village facilities are influenced by the location and design of local schools.

D. *Importance of Non-fiscal Aspects of Educational System to Plaintiff*

Since the school system is at the center of the social, cultural and recreational life of a suburban community, it is not difficult to understand its effect on plaintiff. Adult education programs, financed out of federal, state and local funds and controlled by local school boards, can provide a major source of intellectual stimulation and an opportunity for self-improvement or they may be dull and valueless. In Great Neck, a community in Nassau County, for example, the 1968 spring catalogue of the local school dis-

trict lists over one hundred and fifty adult education courses ranging from "Adult Guidance Testing Workshop" to "Yoga."

Libraries, whose appropriations can be governed by the same electorate which votes in school board elections (N. Y. Education Law §255), may contain the books that appeal to citizens like plaintiff or they may be little more than children's reading rooms. School funds may be spent on swimming pools and playing fields available to members of the adult community or on textbooks and teachers' salaries. The schools may provide concerts, quest speakers, and dramatic performances or they may be silent during non-school hours. A denial of the right to vote in school board elections is a denial of the right to participate in decisions on issues which can give meaning and satisfaction to the lives of citizens like plaintiff.

II. Applicable Law

A. *Rights Under the Federal Constitution*

1. *Equal Protection Grounds*

The validity of section 2012 must be measured by the standards of the Equal Protection Clause. In voting rights cases the rule to be gleaned from the decisions is this: the right to vote on important governmental issues may not be denied to a citizen with intellectual and moral capacity who meets prescribed reasonable age and residence requirements.

School boards need not be elective. *Sailors* v. *Board of Educ.*, 387 U. S. 105 (1967). But this does not mean that the state is free to select any standards it chooses in grant-

ing the vote where the board is elected. As Judge Hays pointed out in remanding this case to be heard by a three-judge court:

> "[T]he Supreme Court has held, 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. Harper v. Virginia Board of Elections, 383 U. S. 663, 665 (1966).'" *Kramer* v. *Union Free School Dist. No. 15,* 379 F. 2d 491, 494 (2d Cir. 1967).

We need not, in this case, decide whether a school board of a New York Union Free School District exercises "legislative" or "executive" powers. In apportionment cases this characteristic seems, for the moment, to be a factor relied upon by the Supreme Court in deciding whether an election is required. *Sailors* v. *Board of Educ.,* 387 U. S. 105, 109 (1967); Sentell, *J.,* Reapportionment and Local Government, 1 Georgia L. Rev. 596, 643 (1967). The distinction has no validity where an important office is filled by a public election and the issue is whether some citizens shall be denied the right to vote. See *Sailors* v. *Board of Educ.,* 387 U. S. 105, 109 (1967) ("since the choice of members of the county school board did not involve an election. . . , the principle of 'one man-one vote' has no relevancy"); *Gray* v. *Sanders,* 372 U. S. 368 (1963). Cf. *Strickland* v. *Burns,* 256 F. Supp. 824 (M. D. Tenn. 1966) (election of county school commissioners from malapportioned districts unconstitutional); *Delozier* v. *Tyrone Area School Board,* 247 F. Supp. 30 (W. D. Pa. 1965) (unconstitutional for directors of school board to be elected from regions with wide disparities in population). See also *Pitts* v. *Kunsman,*

251 F. Supp. 962 (E. D. Pa. 1966) (as a matter of statutory interpretation the composition of an interim school board on a basis other than proportional to district population was improper).

There can be no doubt that the "Equal Protection Clause . . . restrains the states from fixing voter qualifications which invidiously discriminate." *Harper* v. *Virginia State Board of Elections,* 383 U. S. 663, 666 (1966); *Carrington* v. *Rash,* 380 U. S. 89 (1965). The question is whether the objectives of section 2012 and its method of achieving them should be classified as permissible "rational classifications" or as unconstitutional "invidious discriminations."

(a) *Standards in Voting Rights Cases*

States may make reasonable distinctions among their citizens. But their power is greatly circumscribed where the right to vote is involved. Any "alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964). "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry* v. *Sanders,* 376 U. S. 1, 17-18 (1964).

In the field of voting, there is no merit to respondent's contention that qualifications are reasonable if they "rest on real and not feigned differences," and "the distinction have some relevance to the purposes for which the classification is made." *Walter* v. *City of St. Louis,* 347 U. S. 231, 237 (1954) (validity of classification in a city income tax scheme). See also *McGowan* v. *State of Maryland,* 366 U. S. 420, 425-26 (1961) (validity of Sunday closing law).

The traditional test for determining whether a classification is valid under the Equal Protection Clause—rationality

—does not satisfy the requirements of the Clause where the right to vote is concerned. The central importance of this right in our political system recently led the Supreme Court to conclude that "a clearly rational state policy" of apportionment is unconstitutional if "population is submerged as the controlling consideration" in apportionment. *Reynolds* v. *Sims,* 377 U. S. at 581. Such considerations as history, economic or group interests, geography, desire to insure effective representation for sparsely settled areas, accessibility of representatives to their constituents, theories of bicameralism, occupation, balance of urban and rural power, and results of a popular referendum were all rejected as inconsistent with the equal protection requirement of one person-one vote. *Reynolds v. Sims,* 377 U. S. at 622-23 (Harlan, *J.* dissenting).

In dictum the reapportionment decisions have disclaimed the applicability of their strictures to the fixing of voter qualifications. See, *e.g., Gray* v. *Sanders,* 372 U. S. 368, 380-81 (1963) ("Minor felons and other classes may be excluded. . . . But once the class of voters is chosen and their qualifications specified we see no constitutional way in which equality of voting power may be evaded."). But their rationale mandates application of stringent standards in testing the reasonableness of limitations on the franchise. The assumption underlying the reapportionment decisions is that because the right to vote could not be totally denied on the basis of the rational considerations advanced by the states, it could not be even partially denied or diluted on such bases. See *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964) ("It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that otherwise qualified voters had been entirely prohibited from voting"). Thus, denial of the right to vote entirely represents an *a fortiori*

case of dilution of the vote. See *Harper* v. *Virginia St. Bd. of Elections,* 383 U. S. 663, 668 (1966) ("The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote").

Rationality of purpose does not justify denying the right to vote in government elections on important public matters to an adult citizen, morally and intellectually qualified, who meets residence requirements. In two recent cases invalidating state qualifications for voting, the Supreme Court has accepted, in practice, this limitation on state power. *Carrington* v. *Rash,* 380 U. S. 89 (1965); *Harper* v. *Virginia St. Bd. of Elections,* 383 U. S. 663 (1966).

Striking down a provision in the Texas Constitution preventing "[a]ny member of the Armed Forces of the United States" who moved to Texas during military service from voting in any election in the State "so long as he or she is a member of the Armed Forces," the Court rejected the justifications offered—that persons in military service were always subject to reassignment and therefore could not be deemed to be bona fide residents and that there was a danger that the concentrated ballots of military personnel might overwhelm a small civilian community. *Carrington* v. *Rash,* 380 U. S. 89 (1965). The danger of military domination of local elections was an unnacceptable reason for denying the vote to otherwise qualified voters who were members of the Armed Forces because "fear of the political views of a particular group of bona fide residents," cannot be used to deprive them of their right to vote. 380 U. S. at 94. Although acknowledging that "Texas has the right to require that all military personnel enrolled to vote be

bona fide residents of the community," the Court ruled that because some servicemen could in fact acquire bona fide residence while stationed in Texas, the State must "winnow . . . from the ranks of the military those whose residence . . . is bona fide. . . . States may not casually deprive a class of individuals of the vote because of some remote administrative benefit." 380 U. S. at 95, 96.

The Court clearly rejected the rationality standard of the Equal Protection Clause advanced by the defendants in the instant case. As Mr. Justice Harlan's dissent points out, "Texas could rationally conclude" that instances in which military men were residents "would likely be too minimal to justify the administrative expenditure involved" in winnowing them out from the vast majority who were transients. 380 U. S. at 99-100. If the State need only produce "any state of facts [which] reasonably may be conceived to justify" the classification (*McGowan* v. *Maryland*, 366 U. S. 420, 426 (1960)), in order to satisfy the Equal Protection Clause, the Texas provision would have been valid.

In *Harper* v. *Virginia St. Bd. of Elections*, 383 U. S. 663 (1966), the Court declared invalid Virginia's poll tax on the ground that "wealth has no relation to voting qualifications." 383 U. S. at 670. It held that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666.

The dissents of Justices Black and Harlan in *Harper* both persuasively argue that the poll tax could be supported as having a rational basis—the historical belief that those who pay poll taxes are more interested in furthering the State's welfare. But the majority rejected this claim, noting:

> "[w]e have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Id.* at 670.

What showing will support a classification denying the right to vote is unsettled. *Harper* makes any property or wealth qualifications for voting unconstitutional. *Carrington* outlaws a denial of the vote based on fear of the political persuasion of those denied the right and prevents a state from striking a balance against voting rights in favor of administrative convenience. Together with the reapportionment cases, these two cases make it clear that equal protection requires a higher standard for classifications denying or diluting a citizen's vote than has traditionally been required for legislative classifications involving less fundamental political matters.

Lassiter v. *Northampton Cty. Bd. of Elections,* (360 U. S. 45 (1959)) upheld a non-discriminatory literacy test for voting. *But see Cardona* v. *Power,* (384 U. S. 672, 675 (1966) (Douglas, *J.* dissenting)) (constitutionality of a fairly administered literacy test question). *Lassiter* is explicable on the ground that the excluded voters lacked intellectual capacity. This rationale has no bearing on the case before us—plaintiff is a college graduate; here discriminations are based upon whether the voter has property rights or has children attending public schools—criteria having no bearing on intellectual or moral qualifications as a voter. The Supreme Court made it quite clear in *Harper* that:

"Wealth, like race, creed or color, is not germaine to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of property, like those of race . . . are traditionally disfavored. 383 U. S. at 668.

(b) *Standards Applied to §2012*

(i) *Clearly Arbitrary Distinctions*

We need not go beyond the confines of the standards already articulated in the decided cases to find a number of arbitrary and constitutionally indefensible distinctions made by section 2012. Taking first the case of the plaintiff himself—a childless adult—the statute is in direct conflict with the dictate of *Harper* that "wealth . . . has no relation to voting qualifications," for among the class of all non-parents the statute discriminates between those who own or rent property and those who do not.

Whatever doubt there might be that section 2012 imposes a forbidden property qualification for voting is resolved by an examination of the history of the statute. Originally, section 2012 and its predecessors required the ownership of property and the payment of school taxes as a condition precedent to voting. Periodically, new groups have been given rights to vote in school board elections. Thus, in 1867, parents of school children were given the vote. In 1894, a person in possession under a contract of purchase was given the vote. And in 1956, spouses of property holders were given the vote. The most significant addition to the group of citizens allowed to vote in school board elections was the recent inclusion of renters of residential property. The theory behind this amendment was that inasmuch as renters ultimately paid for school taxes in the form of

higher rent, they had an interest almost the same as homeowners and, therefore, could not be denied the vote. Thus, the addition was nothing more than the recognition that in modern society for many purposes the apartment dweller occupies the same place as the homeowner. *Cf. Landes* v. *Town of North Hempstead,* 20 N. Y. 2d 417, 421, 284 N. Y. Supp. 2d 441, 444 (1967). The statute clearly sets up a property qualification for voting. This is a denial of equal protection.

This same reasoning applies with equal force not only to young adults living with their parents, but to older persons residing with their children, to boarders or lodgers, and to clergy, military, and others living on tax exempt property. Assuming persons in each of the groups mentioned do not have children attending district schools, the only line separating these non-parents from the non-parents entitled to vote is the line of property. If you own or rent property you vote, if you do not, you do not vote.

Such discrimination cannot be justified by arguing that the requirements of owning or renting is designed to enfranchise those with a sufficiently stable interest in community affairs to be expected to exercise the ballot responsibly. *Carrington* v. *Rash,* 380 U. S. 89 (1965). As Chief Judge Fuld, speaking for the New York Court of Appeals in a decision striking down an analogous state law requiring the ownership of property as prerequisite to holding local office, so eloquently put it:

> "Ownership of real property does not render one more interested in or devoted to, the concerns of the town. In a society such as ours, characterized by its 'mobility' and 'anonymity' (Cox, The Secular City [rev. ed., 1966], p. 33), a landowner is no more likely to be

permanently established in a town—and, by that token, better qualified to govern—than one who is not a property owner. Examples come readily to mind which demonstrate the unrealistic character of the property qualification: an elected town councilman, suddenly compelled by financial reverses to sell his home and move into an apartment, would be required to resign from office; an apartment dweller who owned a taxpayer in town but who commuted to his place of business in, for instance, New York City and took no interest or part in civic affairs would be fully eligible for town office; and an apartment dweller not owning real property but with a place of business in town and deeply involved in community affairs would be ineligible. All in all, we suggest that it is impossible today to find any rational connection between qualifications for administering town affairs and ownership of real property." *Landes* v. *Town of North Hempstead*, 20 N. Y. 2d 417, 421, 284 N. Y. S. 2d 441, 444 (1967).

The grant of the right to vote to spouses of property owners but not to spouses of property renters is an invidious discrimination with no justification. The statute recognizes that homeowners and apartment dwellers have virtually identical interests in the outcome of school board elections but does not recognize that spouses of apartment dwellers have the same stake in the outcome of the elections as spouses of apartment dwellers. The discrimination is easily circumvented—all that need be done is to have both husband and wife sign the lease and both are then entitled to vote under the statute. But the fact that the provision is little more than a trap for the unwary does not provide constitutional justification.

Taking next the class of all non-property holders who are parents, the statute again makes constitutionally impermissible distinctions. The statute disenfranchises parents whose reason for sending their children to private schools is that the public schools are inferior; they may have a great interest in seeing the public schools improved so that they can avoid the burden of private tuition, yet they are denied a voice in school decisions. Parents with a child about to finish high school will have a vote in the running of school affairs, but the parent with a child about to enter school will not.

(ii) *Overall Scheme Improper*

Despite the "crazy quilt" of arbitrary and impermissible distinctions made by the statute, it is urged that the overall scheme is based on the rational policy of attempting to limit the right to vote to the patrons of the school district—the parents and the taxpayers—and that any minor disenfranchisements occasioned by this rational policy cannot be used to overturn it.

No statistics have been furnished indicating how many otherwise qualified citizens are denied the right to vote in school board elections, but it seems safe to assume that the number is substantial. Even if the number were small, this would not justify arbitrary and discriminatory legislation. A statute which denied the right to vote to redheads would be no less unconstitutional because there was only one redhead in the community. So, here, the arbitrary discrimination cannot be justified on the ground that only a few citizens are denied a fundamental right.

Even if we assume that an overall rational policy need not fall because it works hardship in "isolated" instances,

the scheme of section 2012 does not meet the exacting standards demanded by the Equal Protection Clause when the right to vote is involved. The "rational policy" on which defendants rely is that restriction of the vote to the children attending the district's schools and resident taxpayers allows only those who use and pay for the schools to determine its policies.

In defendants' view such limitation has no more constitutional significance than a provision allowing only those assessed for sewer or water district expenses to vote in such special district elections. What has already been said about the importance of local educational policy makes unpersuasive an attempt to equate school districts with sewer districts.

The plain and simple truth known to every suburban resident is that plaintiff and those similarly situated are directly affected by, and do pay for, local schools. The school system does have a pervasive influence on their lives. The Equal Protection Clause, therefore, requires that they be accorded the same electoral voice as any of their neighbors. The argument that the vote in school board elections is a local matter not of sufficient moment to be given the same preferential treatment as the right to vote for state legislators is unrealistic and must be rejected.

(c) *Inadequacy of the Legislative Remedy.*

It is no answer to plaintiff's prayer for relief that section 2012 is a matter of state law and that plaintiff may cast his vote for members of a properly apportioned state legislature, using his voting influence to seek repeal. Nor is it an adequate response to assert that if plaintiff does not like the way his federal, state or county tax dollar is being spent by the local school board, he can vote in federal,

state and county elections to express his objections. A person denied constitutional rights need not appeal to a majority of voters for redress. As the Supreme Court put the matter in *Lucas* v. *Forty-Fourth Gen. Assem. of Colo.*, 377 U. S. 713 (1964):

> "While . . . a court of equity might be justified in temporarily refraining from issuance of injunctive relief . . . in order to allow for resort to an available political remedy . . . individual constitutional rights cannot be deprived, or denied judicial effectuation, . . . because of the existence of a nonjudicial remedy. . . . An individual's constitutionally protected right to . . . vote cannot be denied . . . by . . . [the] majority of . . . [the] State's electorate. . . ." *Id.* at 736.

Consistent with the principles of limited delay to seek political redress expressed in *Lucas*, the Court might have been justified in awaiting the decision of the voters of the State on the proposed 1967 New York State constitution which would have outlawed the qualification for voting in section 2012. Proposed New York State Constitution, Art. II, §1 (1967). But the voters have rejected that proposed constitution. The time for delay has passed.

In any event, it is by no means clear that plaintiff has an effective political remedy in the state legislature. Although plaintiff is entitled to vote for representatives in a fairly apportioned legislature, the statutory scheme under the New York Education Law strips plaintiff of many potential allies in his quest for an equal voice in school matters. Section 2012 applies only to approximately one-third of the school districts in New York State. In the remaining districts, either the school board is appointive and a citi-

zen's control over the board is exercised by his vote for the mayor who appoints the board or all citizens enjoy the vote. In the districts in which section 2012 applies, most citizens—owners of real property, apartment renters, and parents—are entitled to vote. Thus, in seeking an amendment, plaintiff would be forced to rely on the good will of a majority disinterested in his problem or opposed to any dilution of its own voting power. In attempting to alter allocation of any federal, state or county funds appropriated for education, plaintiff will lack support of other voters because most citizens already enjoy voting participation on the school board level and have power to determine how public school funds are spent.

2. *First Amendment Issues*

The New York statute appears to be unconstitutional on other than equal protection grounds. First, it discriminates against some parents because of their religious beliefs by denying them the right to vote solely because they choose to send their children to parochial or other private schools rather than to public schools. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). A wife of a lessee of real property can vote if her children go to public school but not if they go to private—in the main parochial—school. Second, it limits the effective power of non-voters in an important mode of expression and association. *NAACP* v. *Button*, 371 U. S. 415, 429-33 (1966). Local school boards often pass resolutions directed to the state asking for new aid for educational programs and to the county with respect to the other forms of aid; recently they took public positions on the widely debated issue of repeal of Section 3 of Article XI of the New York State Constitution dealing with aid to parochial schools. Inability to vote and influence such

school board resolutions reduces power to influence important action by the state. Since the parties have not presented these issues we need not decide them at this preliminary stage on a motion to dismiss. *Cf. NAACP* v. *Button, id.* at 444.

B. *Claim Under the State Constitution*

Even if section 2012 could be thought to comply with the Equal Protection Clause of the Federal Constitution, it probably cannot withstand attack under the New York State Constitution. Lower New York courts have held that section 2012 does not violate the State Constitution. *Turco* v. *Union Free School Dist. No. 4*, 251 N. Y. S. 2d 141, 43 Misc. 2d 367 (Sup. Ct. 1964), *aff'd*, 256 N. Y. S. 2d 553, 22 App. Div. 2d 1018 (2d Dep't 1964). Nevertheless, a recent Court of Appeals case striking down property qualifications for town office as an unreasonable classification and as an impairment of the voter's right to a wide choice of candidates strongly suggests that New York's highest court is ready to find that New York's Constitution outlaws property qualifications for voters. *Landes* v. *Town of North Hempstead*, 20 N. Y. 2d 417, 284 N. Y. S. 2d 441 (1967).

The Court of Appeals in *Landes* declared:

> "Turning . . . to the plaintiff—along with other residents of the town—as voter, the proscription against nonlandowners as town councilmen amounts to a 'dilution' or 'debasement' of the vote not unlike that occasioned by the malapportionment which the Supreme Court has held violative of the equal protection clause. . . .

The statutory restriction also violates section 1 of article 1 of the State Constitution which provides that 'No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof'. Wide latitude in choosing public officers is among the rights secured by this constitutional provision. In effect, it vests electors with the right to choose public officers 'on whatever principle or dictated by whatever motive they see fit, unless those motives contravene common morality'. . . . The denial of such a right to electors on property grounds becomes more egregious today, when a large proportion of the population in many towns, especially in suburban areas, are apartment house dwellers. Moreover, we know from experience that it is often the wife who holds record title to a home or other property and that, with increasing frequency, owners of real property have occasion to place the record ownership in real estate investment trusts or syndicates." 284 N. Y. S. 2d at 444-445 (footnote omitted).

Section 2102 of the Education Law provides that a school district officer must be a "qualified voter of the district." This provision, which incorporates the property requirement of section 2012 by reference, seems to be unconstitutional under the *Landes* test. *But cf.* statement of Attorney General of New York, N. Y. L. J., Jan. 19, 1968, p. 1 (*Landes* requires elimination of property qualification in Town and Village laws but not in Education law because parents without property and renters can vote). If section 2102 must fall it seems unlikely that 2012—whose terms cause the infirmity—can stand under New York law.

Having jurisdiction by virtue of the substantial federal question raised in the complaint, this Court has power to

decide state issues arising out of the pleadings. *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 721-29 (1966); *Hurn* v. *Oursler*, 289 U. S. 238 (1933); *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909).

Although ordinarily a federal court would decide a case on a dispositive state ground in order to avoid a constitutional dispute, the nature of the issues in this case make that rule inapplicable. Here, the answer to the federal constitutional question seems clear while the decision on the state ground would be based largely on an extrapolation of a single case. In these circumstances, the Court should place primary reliance on the federal ground.

The suggestion that this Court should abstain in order to let the state courts clarify state law and possibly avoid the federal constitutional question is unacceptable. In the context of the deprivation of fundamental rights, the federal courts should not abdicate their power to redress such important wrongs. See *Zwickler* v. *Koota*, 88 S. Ct. 391 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); Note, Federal-Question Absention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604 (1967).

Conclusion

Viewed either as a matter of federal or state constitutional law, a claim that section 2012 is invalid is supportable. The motion to dismiss should be denied.

Dated: Brooklyn, New York
January 30, 1968

Jack B. Weinstein
U.S.D.J.

AUG 7 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 258

MORRIS H. KRAMER,

Appellant,

v.

UNION FREE SCHOOL DISTRICT NO. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION BY NEW YORK ATTORNEY GENERAL TO DISMISS OR AFFIRM

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The Attorney General of the State of New York, an intervenor (pursuant to New York Executive Law § 71) in this litigation since its inception, moves, pursuant to Rule 16 of the Revised Rules of this Court, to dismiss

this appeal on the ground that the appeal is not within the jurisdiction of this Court, or in the alternative, to affirm—on the ground that the question sought to be presented is so insubstantial as not to merit argument.

Question Presented

The question presented is whether New York Education Law § 2012, which restricts the right to vote in school district elections to persons *in loco parentis* and to classes of persons most directly subject to school district taxes, violates the Equal Protection Clause of the Fourteenth Amendment.

Statement

The statement contained in the appellant's jurisdictional statement is substantially correct, except for the fact that it does not note that the opinions below have been officially reported. 282 F. Supp. 70.

Further, subdivision (a) of the statute challenged (Jur. St., p. 3) has been amended to permit spouses, other than those of owners of real property, to vote in school district elections. See L. 1968, ch. 730 (quoted *infra*, p. 5), extending further the spouses' right to vote previously added by L. 1956, ch. 497).

The Question Is Not Substantial

The appellant concedes (p. 7) that the States need not provide for the election of school boards. *Sailors* v. *Board of Education*, 387 U. S. 105 (1967); but insists (p. 7) that elections of school boards having been provided for in certain localities in New York, this Court's decisions in *Carrington* v. *Rash*, 380 U. S. 89 (1965) and *Harper* v. *Virginia State Board*, 383 U. S. 663 (1966), have abrogated

any standards of "rationality" that may be employed by New York or any other State in classifying persons eligible to vote in a school district election.

The appellant has overstated his case. In *Carrington*, the majority explicitly recognized that Texas had "unquestioned power to impose reasonable residence restrictions on the availability of the ballot" (380 U. S. 89, 91). This Court merely held it to be an *invidious discrimination* for Texas to provide that no serviceman could ever acquire a voting residence in the State so long as he remained in service (380 U. S. 89, 92, 96). Indeed, the majority of this Court took pains to "emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence" (380 U. S. at p. 96).

In *Harper* (*supra*), this Court held a poll tax to be unconstitutional. The "affluence of the voter or payment of any fee" were held to be inappropriate standards which bore no relation to voter "qualifications" and were offensive, as "invidiously discriminating" against those persons required to demonstrate such affluence or to pay such fee (383 U. S. 663, 666, 667). But the Court recognized that the States still had an interest in fixing qualifications which were "germane to one's ability to participate intelligently in the electoral process" (383 U. S. at p. 668).

What the appellant has failed to observe with reference to "qualifications" is that there is a very reasonable relationship, in the categories of "interest" established under Education Law § 2012 of the persons permitted to vote for the members of the school board, to the administrative functions of a local school board. Those permitted to "have a voice" in the election are those whom the State could understandably deem to be the most intimately interested in actions taken by the school board—1) the parents of children attending school in the district, and 2) the real

estate owners and lessees "liable to taxation for school purposes."

This is not a "one man, one vote" case, one involving a vote dilution problem; but a "qualification" case involving intensity or depth of interest as a proper standard for the qualification of a voter in the election of local officials performing an administrative task of special interest to those qualified voters. In *Sailors* v. *Board of Education*, 387 U. S. 105, 111, this Court observed that a State could appoint such officials or elect them or combine the elective and appointive systems. In this "right to vote" case, there appears to be no basis for challenging the reasonableness of election standards which restrict that right to those persons most directly affected and those deemed to be most directly concerned by the actions of the local administrative body. Indeed, this Court, in sustaining a *residence* requirement as a reasonable type of election "qualification", has demonstrated the propriety of State action in insisting upon an intimacy of interest in the subject matter of an election, as a basis for classification. *Pope* v. *Williams*, 193 U. S. 631, 632 (1904); *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 51 (1959). Furthermore, no substantial federal question was found to exist even where the classification of persons permitted to vote in a municipal election was extended to *non-resident* owners of real property in the municipality. *Spahos* v. *Mayor and Councilmen of Savannah Beach*, 207 F. Supp. 688 (So. Dist., Ga., 1962), aff'd *per curiam* 371 U. S. 206 (1963); and see *Glisson* v. *Mayor and Councilmen of Town of Savannah Beach*, 346 F. 2d 135 (5th Circ., 1965). The broad and pervasive general interest of all United States residents and citizens in the subject of education does not and need not, however, make all such residents and citizens eligible to vote in every local school district election.

The 1967 New York Constitutional Convention, whose work was rejected by the voters of the State, proposed a

broad reclassification (Article II) of the rights of persons to vote in various types of elections throughout the State, including school board elections. But the 1967 voter response, rejecting the entire product of the Convention submitted to it on a take-it-or-leave-it-all basis, did not and does not prevent the Legislature from exercising its wisdom to readjust the classifications of voters it deems entitled to vote in school district elections. See Report No. 4 dated March 4, 1967, entitled "The Right to Vote", prepared by the Temporary State Commission on the Constitutional Convention. Indeed, by L. 1968, ch. 730, effective June 16, 1968, the right to vote in school district elections has been extended, during the pendency of this action, to the "spouse of one who leases, hires or is in possession under a contract of purchase".

It should be noted, finally, that the dissenting District Judge had (prior to his dissent in this case) written (Weinstein, "The effect of the federal reapportionment decisions on counties and other forms of municipal government", 65 Col. L. Rev. 21, 35), the following:

> "There remain, however, some troublesome questions in school districts where voting is restricted to homeowners, or to homeowners and parents. Can the tenant without children object on the ground of lack of equal protection? Can the parent object to the childless homeowner's vote on the ground that a nonuser of the service is exercising control? Can the voter without children object that a non-homeowning parent is not paying for the service while exercising control? While all of these questions are interesting, most courts would probably reject such possible lines of attack out of hand."

This appeal, accordingly, should be rejected "out of hand".

CONCLUSION

This appeal should be dismissed, or in the alternative, the judgment should be affirmed.

Dated: New York, N. Y. August 4, 1968.

Respectfully submitted,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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MOTION TO AFFIRM

Question Presented

Should not the District Court's decision and judgment be affirmed where the complaint does not present a substantial Federal question; where the matter is one left by the United States Constitution to the State, and no violation of any federally guaranteed rights and immunities is involved; where the State Courts have already determined a matter which, in the absence of such a violation of federally guaranteed rights is one purely of State law; where

the controversy involved is, furthermore, a political controversy resting properly within the ambit of the legislative function, and therefore not justiciable; and where, finally, previous decisions of the United States Supreme Court have foreclosed the existence of a substantial Federal question?

Statutes Involved

New York Education Law, Section 2012:

"Qualifications of voters at district meetings.

A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is: 1. A citizen of the United States.

2. Twenty-one years of age.

3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

a. Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase *or is the spouse of one who leases, hires or is in possession under a contract of purchase*[1] of, real property in such district liable to taxation for school purposes, but the occupation of real property by a person as lodger or boarder shall not entitle such person to vote, or

b. Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

c. Not being the parent, has permanently residing with him a child of school age who shall have attended

[1] Matter in italics added by Laws of 1968, Chapter 730, effective June 16, 1968.

the district school for a period of at least eight weeks during the year preceding such meeting.

No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section."

New York Education Law § 2603:

(Relating to the 56 City School Districts of Cities with less than 125,000 inhabitants.)

Qualifications of Voters

A person shall be entitled to vote at a school election in a city school district who is:

1. A citizen of the United States.

2. Twenty-one years of age.

3. An inhabitant of the state for one year next preceding the election and for the last four months a resident of the county and for the last thirty days a resident of the school district in which he or she offers his or her vote. If a naturalized citizen, such person must, in addition to the foregoing provisions, have been naturalized at least ninety days prior to the election. In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English.

Where territory is added to a city school district by consolidation or alteration of boundaries pursuant to article thirty-one of this chapter, residence in the territory so added shall be and shall be deemed to be residence in the city school district for the purposes of this section.

Relevant State Constitutional Provisions

New York State Constitution, Article II, Section 1.

> "[Qualifications of voters.] Section 1. Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is twenty-one years of age or over and shall have been a resident of this state, and of the county, city, or village for three months next preceding an election.
>
> Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; subsequent amendments approved by vote of the people November 2, 1943, November 6, 1945, November 6, 1951 and November 8, 1966.)"

New York State Constitution, Article XI, Section 1.

> "[Common schools.] Section 1. The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."

New York State Constitution, Article VIII, Section 4.

> "§ 4. [Limitations on local indebtedness.]
>
> Except as otherwise provided in this constitution, no county, city, town, village or school district described in this section shall be allowed to contract indebtedness for any purpose or in any manner which, including existing indebtedness, shall exceed an amount equal to the following percentages of the average full valuation of taxable real estate of such county, city, town, village or school district: . . .
>
> '(h) any school district which is coterminous with or partly within, or wholly within, a city having less than one hundred twenty-five thousand inhabitants accord-

ing to the latest federal census, for education purposes, five per centum; provided, however, that such limitation may be increased in relation to indebtedness for specified objects or purposes with (1) the approving vote of sixty per centum or more of the duly qualified voters of such school district voting on a proposition therefor submitted at a general or special election, . . .' *The legislature shall prescribe by the law the qualifications for voting at any such election.*" (emphasis supplied.)

New York State Constitution, Article VIII, Section 10.

"§ 10. [Limitations on amount to be raised by real estate taxes for local purposes; exceptions.]

Hereafter, in any county, city, village or school district described in this section, the amount to be raised by tax on real estate in any fiscal year, . . . shall not exceed an amount equal to the following percentages of the average full valuation of taxable real estate of such county, city, village or school district, . . .

(e) any school district which is coterminous with or partly within or wholly within, a city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, for school district purposes, one and one-quarter per centum; . . . The limitation herein imposed for any such school may be increased by the approving vote of sixty per centum or more of the duly qualified voters of such school district voting on a proposition therefor submitted at a general or special election . . . *The legislature shall prescribe by law the qualifications for voting at any such election* . . ." (emphasis supplied.)

Background

Facts

I. Application of voting qualifications under Section 2012 of the Education Law in New York State School Districts.

1. General Information.

The Constitutional basis for school district organization in the State of New York is found in section 1 of Article XI of the State Constitution which reads as follows:

> "The Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated."

In pursuance of this Constitutional mandate the New York State Legislature, through the Education Law, has provided for such a system of free common schools.

All territory in the State (with the exception of certain Indian reservations and areas over which the State has formally ceded jurisdiction to the United States of America) is located in school districts.

The school district system was established in 1812 and has developed through various types of mergers from a total of over 12,000 school districts to a situation where (as of July 1, 1967) there are only 853 school districts in existence. While originally common school districts were subdivisions of towns, it is rare indeed today to find a school district coterminous with a municipality, except for some city school districts including the so-called "Big 6" city school districts (New York, Buffalo, Rochester, Syracuse, Yonkers and Albany).

In fact well over one-half of the New York State school districts are today located in more than one county with many districts covering territory in three and four counties.

There are five types of school districts in existence in this State: There are 128 common school districts (which may not operate a high school) of which number only 39 operate any school at all. There are 169 union free school districts of which two operate no school at all and 38 operate only elementary schools. There are 490 central school districts of which one operates only elementary schools. There are four central high school districts and finally, there are 62 city school districts of which six are fiscally dependent on the cities involved, while 56 city school districts are fiscally independent and levy their own taxes. Of the city school districts, ten have appointed school boards: four of the "Big 6" and, among the 56 smaller city school districts: Binghamton, New Rochelle, Plattsburgh, Rensselaer and Watervliet.

2. Voting qualifications in school districts.

a. In the so-called "Big 6" city school districts no qualified voter of the school district has the right to vote on any school district matter of any kind. In two of these six districts however boards of education are elected at the general election in November, along with elections for city offices (Rochester and Syracuse).

b. In the 56 smaller city school districts the qualified voters of such districts have a very limited right of participation in the Government and affairs of the city school district. The voting qualifications for these districts are found in Education Law Section 2603 and as of

the date of the enactment of this section in 1950, were the same as voting qualifications in the general elections in November. Since 1966 however when the State Constitution was amended so as to substitute the requirement of three months residence both in the State and in the county, city or village for the former requirement of State residence of one year, county, city or village residence of four months and 30 days residence in the election district, the voting qualifications of Section 2603 no longer are identical with the voting qualifications in the general elections. A bill was introduced in the 1968 session of the New York Legislature to correct this discrepancy, but failed of passage in the Senate, having passed the Assembly on March 19 (S. 4159; A. 6209).

As indicated, the voters of these city school districts are allowed to vote on the election of members of the board of education only in the 51 such districts where the board is elected. In five of these districts the board is appointed by the city authorities.

In none of these 56 city school districts are the voters allowed to vote on a school district budget, the purchase or sale of school buildings, the construction thereof and on most other matters which the voters of school districts outside of cities are permitted to vote on. In addition to election of board members, the franchise here extends only to a vote on approval of bond resolutions exceeding five, ten or fifteen year maturities respectively, depending in part on whether or not the board is elected; an increase in the constitutional tax limitation from 1¼% to 1½%, from 1½% to 1¾% or from 1¾% to 2% respectively; on bond issues by which the constitutional debt limitation

would be exceeded for a specific purpose; and on the establishment of a school-district-supported public library.[2]

c. The voting qualifications of section 2012 of the Education Law, here under attack, are applicable only in the 128 common school districts, 169 union free school districts, 4 central high school districts and 490 central school districts, *all of which together comprise less than one-third of the population of the State of New York.*

The franchise is here limited to *school patrons i.e.* to those groups of residents who have a direct interest in the administration of the respective local school systems, because they are either directly concerned as parents of pupils attending the public schools in question, or are directly assessed for real estate taxes as owners (or indirectly as renters) of real estate taxable for school purposes and thus carry a major share of the burden of payment for the services provided by the school district.

It should be noted here that payment of the tax is not required as a part of these voting qualifications. If the parent of the record owner, for instance, actually pays the tax, it is nevertheless the record owner who by virtue of the assessment becomes to that extent a qualified voter. Likewise where a special school district meeting or election is held prior to the tax levy, such assessed person nevertheless is a qualified voter and entitled to vote at such meeting or election. Tax delinquents, further, do not lose the franchise until such time as title changes, through tax sale or otherwise.

---

[2] School districts are only one type of unit that establishes and supports public libraries in New York. It is probable that municipally established and supported public libraries outnumber those related to school districts. In municipality connected public libraries the voters of the municipalities do not exercise the franchise.

d. It must here be noted further that *even where section 2012 is applicable, the great bulk of the school budget is withdrawn from the powers of the qualified voters to determine.* Education Law sections 2023 and 2024 provide that when the qualified voters of the district fail or refuse to appropriate the moneys necessary, in the opinion of the board of education, for teacher salaries and a group of items known as "ordinary contingent expenses," the board of education nevertheless may raise the necessary taxes for such purposes. These two items generally comprise from 75 to 90% of the amounts of the annual school district budgets. *Hence the power of the qualified voters to determine budget appropriations is thus limited to between 10 and 25% of such budgets.*

e. It is pertinent at this point to note briefly that the operations of local school districts are basically financed from two sources: first from a school tax on real estate which is set by the local school board; second from state aid which is paid in accordance with a formula set by the State Legislature. Increasingly now, school districts also receive Federal aid in accordance with standards set by Congress and the regulations of the Department of Health, Education and Welfare. Federal aid is categorical, while state aid is general aid. The tax rate is set by the school board by deducting from the annual appropriation the amounts of state and federal aid and levying a tax for the difference. It may here be added that on a statewide basis, state aid *derived from a number of sources* accounts for about 45% of the cost of operating the state's 853 school districts—also of course there are wide local variations from this norm, the wealthier districts, generally speaking, receiving less state aid than the poorer ones under an equalization principle set by the Legislature.

II. Plaintiff is not a qualified voter.

Plaintiff is a bachelor, without children, living in his parent's home, and rents no real property subject to school tax. He is therefore not a school patron and the operations of the school district in which he lives can have no possible effect whatever on his rights. Not having a child in attendance at the local school or schools, he cannot be directly concerned with the operations thereof; since he pays no part of the local real estate tax burden, the operations of the local school system cannot possibly affect him financially.

To the extent that state aid or federal aid is paid to the district, such allocations of money are not determined by the local school district but by the New York State Legislature (administered by the New York State Education Department) and by the Congress of the United States (administered through the United States Commissioner of Education and, in large part, the New York State Education Department).

Plaintiff has the full franchise in relation to the vote for the members of the State Legislature, and therefore, the total amount of state aid paid by the state and in relation to the members of the Senate and House of Representatives, and therefore the total amount appropriated by Congress and allocated to New York State. The total amounts of state and federal aid are in no way affected by the operations of individual school districts. Consequently, the state and federal taxes payable by plaintiff are in no way affected by the operations of the local school district in which he resides. In some counties a non-real estate tax is levied which in whole or in part is paid by the county to the school districts located, in whole or in part, in that county. Again, the total amount of such tax

is not affected by the operations of individual school districts, and of course, plaintiff has the franchise relating to elective county officers.

He therefore cannot possibly have any actual interest in its operations and a non-existing interest cannot possibly enjoy constitutional protection.

III. Changes in school district voting qualifications through the political processes.

1. Much has been said in this litigation about the unreasonableness of allowing the spouse of a record owner of real property to vote in school district meetings and elections, but denying this right to the spouse of a person who rents, leases or is in possession under a purchase contract.

The New York State Legislature, during the course of this litigation, has remedied this situation by Laws of 1968, chapter 730, effective June 16, 1968.

Such spouses now are qualified to vote in school district meetings and elections.

2. In the smaller city school districts, the original 1917 enactment (chapter 791) provided substantially the same voting qualifications as does section 2012 here under attack. This provision was amended by Laws of 1921, chapter 384 and Laws of 1926, chapter 332 in various minor details.

When the laws applicable to this group of city school districts were generally revised in 1950 and 1952, the voting qualifications were completely changed so as to be identical with the then existing qualifications for general elections (see Laws of 1952, chapter 182). This identity continued to 1966 when the State Constitution was amend-

ed, creating a discrepancy between the two qualification provisions. As indicated above a bill was introduced to reconstitute conformity but failed of passage. The bill will be introduced again at the 1969 Session of the Legislature.

3. The proposed new State Constitution prepared by the 1967 Constitutional Convention would have eliminated any discrepancy in voting qualifications between general elections and *any* school district meetings and elections. For reasons presumably not connected with this subject, the proposal was rejected by the voters of the State.

4. The New York Legislature has established a Joint Legislative Committee for the revision and simplification of the New York State Education Law. This Committee is presently considering a similar change. If this proposal is finally adopted by the Committee, as is most likely, the proposal will be put in bill form and be submitted to the 1969 or 1970 legislative session. If the Legislature passes such an amendment, as it did pass the 1952 amendment relating to the 56 smaller city school districts, the issues of this litigation will of course become moot.

It is clear, therefore, that any statements below that the political processes are here unavailable or ineffective, are wholly untenable.

The Question Presented is Unsubstantial

Appellees herein move to affirm on the grounds that the question presented is so unsubstantial as not to need further argument.

Summary of Argument

I. The District Court properly held the complaint to be unsubstantial.

A. Appellant has sustained no injury whatsoever.

B. The statute in question is purely of State concern, its Constitutionality has been upheld by the State courts and it violates no Federally protected right.

II. No decision of this Court supports appellant.

A. A New York School District is not a multi-purpose, or general, governmental unit, but purely administrative and with a very limited specialized scope.

B. The statute is well within the ambit of permissible State action, closely and rationally connected with its purpose.

C. The political processes are adequate, available to appellant, and actually in progress.

D. The prayer for relief, based, as it is, on a total absence of injury, is wholly disproportionate to the effect such relief, if granted, would have on the affected part of the school system.

POINT I

The Decision Below, holding the complaint to be unsubstantial, is clearly correct.

Chief Judge ZAVATT of the United States District Court for the Eastern District of New York held:

> ". . . plaintiff's claim so obviously without merit, that it can only be characterized as frivolous" (259 F. Supp. 164, 167).

Chief Judge LUMBARD of the United States Court of Appeals for the Second Circuit, dissenting at 379 F. 2d 495, stated:

> "There is no need for three judges to consider a claim *so patently without any merit*" (emphasis supplied).
>
> "Accordingly, I would affirm Judge ZAVATT's holding that the constitutional issues raised by plaintiff's complaint are unsubstantial . . ."

Ironically, Judge KAUFMAN, whose vote caused the convocation of the three-judge court, made it quite clear that he did not *"view appellant's claim as being meritorious."* It is thus submitted that Judge KAUFMAN also felt that the complaint was unsubstantial but, as a matter of *"elegantia juris"*[3] should be dismissed by three judges rather than by a single judge.

Judges MOORE and BARTELS in dismissing the complaint, obviously also found the same to be unsubstantial.

It is submitted, in the light of prior decisions of this Court and all applicable principles of law, that the question is wholly unsubstantial, and that the decision below is correct and needs no further argument.

A.

Appellant can have no possible legal interest in the operations of this school district and cannot show any injury whatever.

The salient fact here is that appellant has no spouse, has no children and neither owns nor rents any real property

[3] 379 F. 2d 491, 498.

assessed for school taxes; he does not have a school-age child living with him nor is he in possession of taxable real property under a purchase contract.

At the very outset therefore, it is submitted that appellant is in *no position to raise questions not applicable to him, i.e.,* to represent classes of persons other than his own (*Barrows* v. *Jackson,* 346 U. S. 249, 255; *Doremus* v. *Board of Education,* 342 U. S. 429, 432, 433; *Tilleston* v. *Ullman,* 318 U. S. 44; *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151, 162-164). Hence, whether this rule be viewed as a constitutional limitation on the jurisdiction of the Court, or as the Court's own complementary rule of self-restraint, appellant must be limited to the facts directly applicable to him. Questions therefore relating to various types of parents, spouses (see Point II, C., *infra*), clergy, etc., are not before the Court at all.

As far as appellant and his own class is concerned however, it is axiomatic that he must have "*a personal stake in the outcome of the controversy*" (*Baker* v. *Carr,* 369 U. S. 186, 204; *Flast* v. *Cohen,* ____U. S. ____, 20 L. Ed. 2d 947). Appellees submit that appellant has no such "personal stake" whatever in this matter. Translated into the language of the rules of standing, which are so closely related to justiciability, appellant fails to establish the necessary dual nexus between the status he asserts and the claim to be adjudicated. For one thing, he is not injured, legally or otherwise, and secondly (see B. *infra*) there is no violation of a constitutional provision involved here.

Appellant can have no justiciable interest in the premises, because he has no actual or direct factual interest. *A non-existing interest can not be constitutionally protected.*

First, he has no child in school and therefore the manner of operation of the school district can not affect him. His alleged "interest" is purely theoretical, *and in no way different from his like "interest" in the operations of the schools in Mississippi or Chicago.* We are all tangentially affected by the quality of education in other districts, other states, and even other countries. This however does not entitle us to vote in these places. Appellant can have no greater actual interest in this school system than any non-resident of the district would have.

The "vague generalizations"[4] of peripheral matters referred to in the dissent below can not serve to change this fact.

Appellant, secondly, can not complain of any financial effect of the operations of this school district on his pocket-book. He has no financial stake therein. He pays no school tax, directly as owner or indirectly as renter.

Insofar as state aid payments to the district are concerned, appellant can vote on the election of members of the State Legislature which sets the formula on the basis of which state moneys flow into the school system and which determines the total amount so to be allocated. This total amount however is not affected by the operations of an individual school district.

The same is true of federal aid. Appellant can vote on the election of members of Congress which determines the formulae of allocation of federal funds to the states and the school districts therein and determines the total amount thereof, which again is not affected by the operations of this school district.

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[4] 282 F. Supp. 70, 75.

In some counties in the state (on information and belief, only Erie County and Monroe County) a county non-property tax is levied which is paid to the school districts in the county. No such county tax exists however in Nassau County, where appellant resides. Hence the dissent below is in error on this point, as it is also in such statements as those which declare that "it is the county, towns and villages which share the responsibility for much of the expense attributable to school district activities" (school district operations are paid for from school district funds and, as indicated in the "background facts" above, school districts are only in very few instances coterminous with municipalities) and that "decisions reached by local school boards have an impact on the fiscal decisions of every level of government" (the *existence* of school districts, and the number and types of students therein, of course have such an impact, but not the administration thereof). In any event appellant can vote on the election of county officers and whatever county operations may be subject to referendum. In those counties where such non-property taxes exist, it is county government which makes these determinations.

Appellant's taxes other than the local school district real estate tax which he does not pay, are therefore in no way affected by the operations of the school district and his pocketbook can not therefore be affected by his ability to vote in school district meetings or elections or his disability so to do.

Appellant therefore is not injured in any way. It is submitted that the extraordinary remedy of an injunction against the enforcement of state law can be used only where grave and irreparable harm is involved. Where there is no injury at all, such an injunction can not be imposed.

Hence the judgment below should be affirmed and the appeal dismissed.

B.

Section 2012 is purely a matter of State concern and violates no provision of the United States Constitution.

1. The key consideration here is the fact that the present controversy involves solely the validity of a State statute providing for voting qualifications in certain *school district* meetings and elections in the State of New York. *Not involved* here is any question of voting qualifications governing election of members of Congress or of members of the State Legislature or the election to any State-wide office, or any multipurpose, or general government unit.

This Court has consistently held that, as stated in *Highland Falls Dairy* v. *Agnew*, 300 U. S. 608, 612:

> "How power shall be distributed by a State among its governmental organs is commonly, if not always, a question for the State itself."

The United States Constitution and laws *do not guarantee or secure to anybody the right to vote on school district matters:*

(a) Education is clearly one of the areas reserved to the States under the United States Constitution. Hence:

> "It is not the function of [the Federal] Court to make educational policy or to resolve conflicts in educational territory. Neither is it the function of the Court . . . . to substitute its judgment for that of the [State or local school authorities] . . . . All [the] Court can and should do is determine whether Federally protected rights . . . . were violated . . . ."
>
> *Dove* v. *Parham*, 181 F. Supp. 504 (affd. 282 F. 2d 256).

Unless a clear violation of Federally protected rights is involved, education is purely a State function.

Cumming v. *Richmond County Board of Education*, 175 U. S. 528;
Gong Lum v. *Rice*, 275 U. S. 78.

While it is axiomatic, of course, that the Fourteenth Amendment and Civil Rights legislation are the Federal safeguard against denial of equal protection of the laws and denial of due process, with respect to voting qualifications in any kind of election, including school elections, and with respect to various other aspects of the educational system, nevertheless it is well established that the education of the citizens within their States is a State and not a Federal function. It is equally well established that in this field:

> "any interference on the part of Federal authority with the management of such schools can not be justified *except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.*" (Emphasis supplied.)
>
> *McSwain* v. *County Board of Education*, 104 F. Supp. 861, 869.

(b) As indicated, since education is a matter reserved to the States, nothing in the United States Constitution or laws guarantees anybody the right to vote on local school district matters. School districts are subordinate instruments of the State, and the regulation by the State of its subordinate units is likewise a matter in which the Federal Courts may not interfere, according to a long line of decisions of this Court. Hence, likewise, the United States Constitution does not guarantee anybody the right to vote on matters affecting the internal management of villages or towns, water districts, fire districts, garbage districts, police dis-

tricts, lighting districts, local improvement districts and many others. All of these, including our school districts, are subordinate and often very minute geographical units through which the States carry on purely local administrative functions and which are subject completely to State control. Unless violations of racial equality or other Federally protected rights are involved, the State legislatures have complete control over any aspect of the internal management and administration of any of these subordinate units. *As to all these matters this Court has completely foreclosed the existence of any substantial Federal question.*

Hunter v. *Pittsburgh,* 207 U. S. 161, 177-179 and many cases cited there.

> "the Fourteenth Amendment permits these States a wide scope of discretion in enacting laws which affect some groups of citizens differently from others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislators are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."
>
> *McGowan* v. *Maryland,* 366 U. S. 420, 425, 426.

> "Constitutional doctrine permits selectivity in regulatory statutes, State or Federal . . . It is accepted constitutional doctrine that equal protection does not require identity of treatment, if there be reasonable ground for difference of policy."
>
> *Blue & Gold Stamps, etc.* v. *Sobieski,* 190 F. Supp. 133, 136, 137, and cases there cited.

> "Equal protection only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purposes for which the classification is made."

Walters et al. v. *City of St. Louis,* 347 U. S. 231. In *Green* v. *Frazier,* 253 U. S. 233, 239, this Court held that in relation to legislation, every presumption is in favor of validty "and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.". Legislative classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." (*Allied Stores, etc.* v. *Bowers,* 358 U. S. 522 and cases cited there.)

To the same effect:

Brown-Forman v. *Kent,* 217 U. S. 563, 573;
State Board v. *Jackson,* 283 U. S. 527, 537;
American Sugar Ref. Company v. *Louisiana,* 179 U. S. 889;
Stebbins v. *Riley,* 268 U. S. 137, 142.

"Such corporations are the mere creatures of the Legislative will; and inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified or diminished at any time, without their consent and even without notice. They are but subdivisions of the State, deriving even their existence from the Legislature."

Laramie County v. *Albany County,* 92 U. S. 307, 312.
Kiernan v. *Portland,* 223 U. S. 151, 164;
Pawhuska v. *Pawhuska Oil Company,* 250 U. S. 394;
Risty v. *Railroad,* 270 U. S. 378, 390;
Stewart v. *Kansas,* 239 U. S. 14.

A very apposite case arose in *O'Neill* v. *Leamer,* 239 U. S. 244. In this case the Nebraska Supreme Court had held (93 Nebraska 786, 789) against plaintiffs on their contention that it was not within the power of the legislature to

authorize a portion only of the property owners in the proposed district to vote on the establishment of the district. This Court said (page 248):

> *"the objection as to suffrage qualifications in connection with the organization and management of the district . . . is likewise wholly devoid of substance."*. (Emphasis supplied.)

To the same effect:

> *Kies* v. *Lowrey*, 199 U. S. 233;
> *Worcester* v. *Street Railway Company*, 196 U. S. 539, and the many cases cited there;
> *Covington* v. *Kentucky*, 173 U. S. 231;
> *Newton* v. *Commissioners*, 100 U. S. 548;
> *Mount Pleasant* v. *Beckwith*, 100 U. S. 514;
> *Kelly* v. *Pittsburgh*, 104 U. S. 78;
> *Cole et al.* v. *Norborne Land Drainage District*, 270 U. S. 45.

Neither the Constitution of the United States nor any decision of this Court denies or casts doubt upon the validity of a provision such as § 2012. The Federal Constitution does not deny to the States the right to make reasonable classifications and fix reasonable requirements for voting, and this Court so holds. *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45 (1959); *Gray* v. *Sanders*, 372 U. S. 368 (1963). As long as voter qualification is not a means or cloak for discrimination against one class or group, "States can within limits specify the qualifications of voters in both state and federal elections; the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. I, § 2" (Mr. Justice DOUGLAS in *Gray* v. *Sanders*, *supra*, 372 U. S. 368, 379).

In his opinion in the *Lassiter* case, writing for a unanimous Court, Mr. Justice DOUGLAS spelled out the authority

and latitude resting in the States to fix voter qualification (pp. 50, 51):

> "The states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope* v. *Williams*, 193 U. S. 621, 633; *Mason* v. *Missouri*, 179 U. S. 328, 335, absent of course the discrimination which the Constitution condemns. . . . So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U. S. 651, 663-665; *Smith* v. *Allwright*, 321 U. S. 649, 661-662) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States* v. *Classic*, 313 U. S. 299, 315. . . . the right [to vote] protected 'refers to the right to vote as established by the laws and constitution of the State.' *McPherson* v. *Blacker*, 146 U. S. 1, 39.
>
> "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdictions."

2. *In this matter of purely state concern, the State Courts have already decided the question contrary to the contention of appellant.*

The precise question has been passed upon by the State Courts *including the Court of Appeals,* in *Turco* v. *Union Free School District No. 4 of the Town of Hempstead, Nassau County,* 43 Misc. 2d 367, affd. 22 A. D. 2d 1018, appeal to Court of Appeals dismissed for want of a substantial constitutional question, March 11, 1965 (see N. Y. Law Journal March 15, 1965—Appendix C—not officially reported).

The general principle or the precise question also has been recognized in:

Matter of Gage, 141 N. Y. 112;
Spitzer v. *Village of Fulton,* 172 N. Y. 286;

Johnson v. *City of New York,* 274 N. Y. 411;
Blaikie v. *Power,* 13 N. Y. 2d 134;
Berge v. *Hollister,* 275 App. Div. 852;
Jankowski v. *Parsons* and *Johnson* v. *Parsons,* 207 Misc. 107, affd. 285 App. Div. 601.
See also *State Tax Commission* v. *Barnes,* 14 Misc. 2d 311.

In 1963, the Court of Appeals held that Article II, § 1 of the *State Constitution* is limited in its application to elections involving state officers or state issues. *Matter of Blaikie* v. *Power,* 13 N. Y. 2d 134, 144 (concurring opinion of Judge BURKE). The precedent noted for this holding was *Spitzer* v. *Village of Fulton,* 172 N. Y. 285, 289 "cited with approval in" *Johnson* v. *City of New York,* 274 N. Y. 411, 419. (*Matter of Blaikie* v. *Power, ibid.*)

The statutory history in respect to voting at school district meetings which has continued parallel with the different voter qualifications in the State Constitution since 1826, constitutes legislative construction of that constitutional provision as not pertaining to school district voting. (*Berge* v. *Hollister,* 275 App. Div. 852, 853; and see *Matter of Carrick,* 183 App. Div. 916). Boards of Education need not be elected. *Johnson* v. *Parsons,* 207 Misc. 107, 112, affd. 285 App. Div. 601 (4th Dept., 1955); *Bullock* v. *Cooley,* 225 N. Y. 566 (1919).

This is necessarily so in the nature of school districts as part of the state system of education. *Lanza* v. *Wagner,* 11 N. Y. 2d 317. School districts are creations, pursuant to statute of the administrators of the state education system (*Matter of Bethlehem Union Free School District* v. *Wilson,* 303 N. Y. 107, 114 [1951]). They are not units having multiple governmental functions. They are limited

to the administration within their boundaries of the state school system of elementary and secondary schools.

The Constitution now declares in Article XI, § 1, that "the legislature shall provide for the maintenance and support of a system of free common schools." (*Cf. Lanza* v. *Wagner, supra,* 11 N. Y. 2d 317, 326 [1962], app. dis. 371 U. S. 74, cert. den. 371 U. S. 901). There is no provision in the Education article of the Constitution for school districts, nor for the manner in which they shall function. All this is left to the Legislature, which had provided for school districts and school district elections for 82 years before Article XI, § 1 was written into the Constitution in 1894.

The explicit recognition that Article II, § 1 does not apply to school district voting on financial matters even where such vote has been provided in the Constitution, has been in the Constitution itself since 1949. An amendment to Article VIII, the Local Finance article, in that year, made provision (§ 10) for voting on increase of real estate taxes in certain school districts, declaring: "The Legislature shall prescribe by law the qualifications for voting at any such election." In 1951, Article VIII, § 4 was amended in respect to limitations on local indebtedness. Provision was made for vote on increasing indebtedness in certain school districts again declaring: "The Legislature shall prescribe by law the qualifications for voting at such election."

To go back more than a century prior to 1949, qualifications to vote at school district meetings have been in the statutes since 1826 in essentials as they are now; unchanged in any major details since 1895. The provision for voter qualification has been in the Constitution since 1821. Since 1826—when property qualifications were omitted in the main from voter qualification in the Constitution—voter

qualification for school district meetings and voter qualification in the constitutional provision have been divergent. This continued divergence is practical and legislative construction of the constitutional provision on voter qualification as having no bearing on qualification to vote at school district meetings.[5] Both the Constitution and school district statutes have been revised over and over again this nearly century and a half. The people, constitutional conventions, and the Legislature, which has both initiated amendment of Article II, § 1 several times and has enacted revision of the school and education law numerous times, have obviously deemed the differences in voter requirements of the two entirely proper; obviously deemed the constitutional provision irrelevant to school district meetings;[6] and put the constitutional imprimatur in 1949 and 1951 on leaving qualification for voting provided in the Constitution in certain school districts on indebtedness and taxation, to be prescribed by the Legislature.

Apart from this direction in Article VIII of the Constitution itself, the long period of practical and legislative construction

> "is entitled to great [if not] controlling weight in its interpretation. It has almost the force of a judicial exposition (Story on Const., § 408), and, unless such legislation and practice is manifestly in violation of the words used, the greatest weight should be given to it in construing them. (Cooley Const. Lim., 67,

[5] There are also property qualifications for voting in Village Law § 41; Town Law § 84; General Municipal Law § 120-p, and other statutes.

[6] The validity of Education Law § 2012 is accepted by the Courts as premise for application of it. See, for example, *State Tax Commission* v. *Barnes, et al.*, 14 Misc. 2d 311, 314 (1958); *Matter of Schreiner* v. *Allen*, 13 A. D. 2d 871, 872 (3d Dept., 1961), 10 N. Y. 2d 707.

and cases cited.)" *People ex rel. Williams* v. *Dayton*, 55 N. Y. 367, 378 (1874).

The Court of Appeals so wrote in that case of a period of legislative interpretation far shorter than the century and a half now passed during which the constitutional provision for voter qualification has been construed by the enactment of statutes providing different voter requirements at school district meetings and municipal elections.

In 1908, the Court of Appeals said, in *Village of Saratoga Springs* v. *Saratoga Gas, etc. Co.*, 191 N. Y. 123, 124:

> "It is now one hundred and thirty years since the people of this state adopted their first Constitution. Since that time there have been four constitutional conventions, framing new Constitutions, whose work, in whole or part, has been adopted by the people, besides which some extensive amendments have been enacted in the method provided by the Constitution. The people have had ample opportunities to correct any misconception or misconstruction on the part of public officers, as to their powers, whether legislative, executive or judicial, and any exercise of power by the legislature, which for a long time has passed unchallenged or, if challenged, has been sustained by the courts, must be deemed to have been approved by the people, unless forbidden by subsequent constitutional provision."

This principle of legislative and practical construction is honored as well by this Court when the Constitution of the United States is invoked in a challenge to a State statute (*Frank* v. *Maryland*, 359 U. S. 360, 370, 371 [1959]; Mr. Justice Holmes writing for a unanimous Court both in *Paddell* v. *City of New York*, 211 U. S. 446, 448 [1908], and in *Jackman* v. *Rosenbaum*, 260 U. S. 22, 31 [1922]).

The rationale of the *Spitzer* opinion on the subject of the justification for the property qualification for voting

in the statute there before the Court, forcibly demonstrates the justification today for the voter qualification provisions of Education Law § 2012.[7]

Necessarily the ruling in the *Spitzer* case that Article II, § 1 applies only to State elections and issues would be unchanged by time and was, as has been said last reaffirmed by the Court of Appeals in 1963 in *Blaikie* v. *Power, supra,* 13 N. Y. 2d 134, 144.

There is no less cogency today for the Court's statement in its opinion as to the justification for property qualifications in village elections on monetary issues, than moved the Court when it wrote its now long accepted opinion.

Indeed the times and conditions of the present make the words of the *Spitzer* opinion thrice applicable to voting qualifications today at school district meetings; language such as (172 N. Y., at p. 290):

> "What better or more effective method of preventing such abuses [in debt contracting] and protecting such taxpayers could be devised than to restrict the right of voting upon propositions for borrowing money or for contracting debts, to the persons who are liable to be taxed for the payment of such debts? . . . . the established policy of this state has been to limit the right of suffrage as to the business or financial affairs of its various villages to the taxpayers of the munici-

[7] The decision of the N. Y. Court of Appeals in *Landes* v. *Town of North Hempstead* (20 N. Y. 2d 417), does not support appellant. It was merely another finding of lack of ". . . . reasonable relation . . . 'to the object sought to be accomplished by . . . . legislation' ". The paramount distinction, however, is that the decision dealt not with qualifications to vote, but with qualifications to hold public office. There is no reasonable relation between a man's ability to hold public office and the fact that he happens to hold title to real estate. In the cause at bar, it is school patronage and its attendant direct concern with and awareness of school problems that is the criterion.

> pality, and it has never been its policy to confide their financial affairs to the general voters therein."

In this day when education is so enormously costly, when the standards and quality of education bought at its high cost are of such concern, how reasonable and justified it is that those who vote the large sums to be spent and the large taxes to be paid, be the ones whom these costs and the education it buys most affect:—the parent (or one who stands as parent) of a school age child attending a district school, and the school district taxpayer (directly as home owner or indirectly as tenant).

As Mr. Justice FRANKFURTER said in *Frank* v. *Maryland, supra,* 359 U. S. 360, 371 (1958) of another type of legislation:

> "Nor is this a situation where a new body of knowledge displaces previous premises of action. There is a total want of important modification in the circumstances or the structure of society which calls for a disregard of so much history. On the contrary, the problems . . . have multiplied manifold, ..."

More today—not less—than when the *Spitzer* case was decided, it is reasonable and justified that financial issues should be resolved for the school district by the vote of those who have real and practical concern with, and awareness of, them, and not by those who have merely abstract or philosophical views thereon, and no contact with them.

Hence, the State Courts, in *Turco* v. *Union Free School District No. 4 of the Town of Hempstead,* properly found that there was no constitutional objection to Education Law § 2012, and its special voting qualifications; it is to be noted that the question of Constitutionality under the United States Constitution was, in that case, argued extensively as well.

It is respectfully submitted, therefore, that the State Courts having conclusively settled this matter of purely State concern, there is not, and there cannot be, any substantial federal question involved.

The judgment below, therefore, should be affirmed and the appeal dismissed.

POINT II

No previous decision of this Court supports appellant's claim—in fact previous decisions of this Court have foreclosed the existence of a substantial question.

The decisions, on which appellant seeks to base his claim of substantiality, do not support his claim.

1. *Brown and Gomillion*

Both of these cases dealt with racial discrimination which is not here involved. Hence they are irrelevant to the issues here presented.

a. *Brown* (347 U. S. 483) applies the Equal Protection Clause to school districts. Appellees wholly agree with the rule but deny its relevance absent invidious discrimination which is not here presented.

b. *Gomillion* (364 U. S. 339). This case also is not relevant. Section 2012 involves no racial discrimination either in the statute itself or in its application. Mr. Justice WHITTAKER's concurring opinion merely reaffirms *Brown,* as to the applicancy of the Fourteenth Amendment to subordinate political subdivisions of the state in cases of abuses of state power.

2. *Reynolds, Baker and Avery. All three of these are "dilution" cases, having nothing to do with voting qualifications and are wholly irrelevant.*

a. *Reynolds* (377 U. S. 533) and *Baker* (369 U. S. 186). Not only did these cases not involve subordinate governmental units of any kind, but they dealt solely with the weight of one vote as compared with another.

b. *Avery* (____ U. S. ____, 88 S. Ct. 1114). While this case applied Reynolds to a unit of local government, that unit nevertheless was a multi-purpose, or general, governmental unit as distinguished from a special purpose administrative unit of extremely limited scope, as here. The Court there clearly distinguished between administrative and legislative powers. It speaks of a unit possessing "general responsibility and power for local affairs" (the unit there governed such diverse areas as courthouses and jails, health, county contracts, roads, bridges, welfare, elections, county taxes, tax equalization procedures and county bonds).

The Court specifically stated at page 1121:

> "Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that *units with general governmental powers over an entire geographic area* not be apportioned among single-member districts of substantially unequal populations" (emphasis supplied).

3. *Carrington, Harper, Morgan and Mabry.*

While these decisions deal with various aspects of voting qualifications, none of them deal with a special purpose administrative local unit of the narrowly limited scope here presented.

a. *Carrington* (380 U. S. 89). For one thing, this decision dealt with statewide elections rather than with

qualifications for a local limited special purpose administrative unit and is therefore not here applicable. More importantly however, the decision points out that reasonable classifications may be drawn by state legislatures limiting the franchise, but that the statute there in question had *no reasonable connection with its purpose.* "[T]he uniform of our country . . . [must not] be the badge of disfranchisement for the man or woman who wears it" (page 681). The case does not support appellant's position.

b. *Harper* (383 U. S. 663). Here again the franchise was statewide and applicable to any and all elections, rather than limited to a local narrowly circumscribed administrative unit. In such a general statewide setting, governing all general elections, it was held that the affluence of a voter or the payment of a fee can not be made an electoral standard. The Equal Protection Clause, it was held "restrains the States from fixing voter qualifications *which invidiously discriminate*" (emphasis supplied). But references to *Yick Wo* (118 U. S. 356) and *Reynolds (supra)* as well as other references make it crystal clear that the Court was speaking of the *general franchise only* which "is preservative of other basic civil and political rights," is "preservative of all rights" (page 667). This is further demonstrated by the emphasis on the language quoted from *Reynolds:* "The Equal Protection Clause demands no less than substantially *equal state legislative representation* for all citizens of all places as well as of all races" (pages 667, 668, emphasis supplied).

Consequently, the passage on which appellant seeks to rely:

> "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn

which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment" (page 664) must be read in the light of its true meaning which clearly is limited to the *general franchise* and does not cover such local narrowly limited special purpose administrative units as in the cause at bar.

This decision therefore likewise does not support appellant's claim.

c. *Morgan* (384 U. S. 641). While this decision deals with voting qualifications, it again deals with the general franchise, rather than with the issue presented by the cause at bar. More importantly however, that decision deals with a specific and express enactment of Congress (and the Supremacy Clause) while no act of Congress is involved here.

d. *Mabry* (380 U. S. 251). What has been said about *Carrington* (*supra*, a) is equally applicable here.

4. *Sailors* (387 U. S. 105). *This case strongly supports appellees' position.*

> "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the Governor, by the Legislature, or by some other appointive means rather than by an election" (page 653).
>
> "Save and unless the state, county or municipal government runs afoul of a federally protected right, it has *vast leeway in the management of its internal affairs*" (emphasis supplied—page 654).
>
> ". . . the County Board of Education performs essentially administrative functions, and while they are important, they are not legislative in the classical sense" (page 655).
>
> "*At least as respects nonlegislative officers, a State can appoint local officials or elect them or combine*

elective and appointive systems . . ." (emphasis supplied—page 655).

"Since [no election] was required *for these nonlegislative officers,* the principle of 'one man, one vote' has no relevancy" (emphasis supplied—page 655).

It must be emphasized that the Court *did not restate* the phrase from *Harper* referred to above (to the effect that where the State provides for the franchise, "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment") in *Sailors.* The reason, it is submitted, is that that phrase relates to *general elections only,* and does not apply to local nonlegislative units (see 3b *supra*), in line with the language from *Sailors* referred to here.[8]

The Court merely said "If we assume, arguendo," but continued that even if such an assumption were to be made, it still would not apply to such narrowly limited special purpose administrative units as the present case involves.

It is submitted that *Sailors* most strongly supports appellees.

A.

There is a vast difference between a vote relating to a general governmental unit and the extremely limited vote under Section 2012.

1. As shown above (II.) the Court's characterization of the franchise being "preservative of other basic civil

[8] It must be noted that the Michigan statute in *Sailors,* referred to in fn 1 at page 106 (Mich Stat Ann § 15.3511) sets forth differing school district voting qualifications depending on the subject of the vote: If the vote relates to bonds or tax limits, only property owners or their spouses may vote (Michigan Constitution of 1963 Article 2 § 6 referred to in said § 15.3511).

and political rights," being "preservative of all rights" *(supra)*, can only have reference to the *general franchise*, *i.e.*, the franchise as it relates to general governmental functions on the State, city or county level.

Section 2012 on the contrary relates only to the administration of elementary and secondary schools which are closely governed by State law. It is further limited to school districts other than city school districts, *i.e.*, one-third of the population of the State, and it is finally limited in subject matter or scope of the vote, to from 10 to 30 per cent of the budgets of these districts, together with capital projects and the election of members of boards of education thereof. Some of these districts are minute geographical units.

Example I

A typical example of the extent of the franchise under Section 2012 follows:

In 169 of these districts (those not maintaining a high school) the most important question the qualified voters must decide, is whether to send their high school students to District A or District B for their high school education. He who has no child to be sent, can have no possible interest in this choice, legally or otherwise. Where there is a difference in the tuition charges between Districts A and B, of course, the real estate taxpayer who carries a large share of the cost will find his pocketbook affected and thus is properly included in the franchise. But where a person neither has a child involved nor is financially affected by such a choice, his lack of access to the franchise can cause no possible injury to him—nor does such an extremely limited administrative decision affect any other governmental function or unit. The limitation of

the franchise to those affected by such administrative decision is thus well within the powers of the State and can not possibly pose a constitutional problem.

Example II

In a district operating its own high school, the qualified voters, for instance, might vote on whether to add four classrooms to an existing high school building. If the vote is affirmative, it would require the board of education to advertise for bids, accept the lowest responsible bidder and proceed with construction. This can affect only two classes of persons: (1) those who have children attending the school building and who will either actually use the new classrooms or whose crowded classrooms will be relieved by the new facilities and (2) those persons who by virtue of assessment of their property carry a large share of the cost of the new classrooms, and find their pocketbooks affected. This use of the franchise, however, can not and does not affect the city, county, village, town, or any other governmental unit, nor has it any effect on the health, welfare, police, highway, or any other functions or services of any level of government.

2. As this Court stated in *Sailors*, such a nonlegislative area is well within the proper sphere of state legislation which may "combine elective and appointive systems" (page 655). New York has done just that. In the so-called "Big Six" districts, four boards of education are appointed by city authorities and no one votes on school matters at all. In five of the smaller 56 city school districts, the board of education is likewise appointed by city authorities, while in all 56 such districts the franchise is vastly limited in scope. In the districts subject to Section 2012 other limitations are involved, including the limita-

tion on voting qualifications. It is submitted that all these purely administrative details are properly left to state legislation without in any way violating the Equal Protection Clause.

If the phrase from *Harper,* referred to above, is to be taken as the ground rule for such administrative details, it would seem to follow that the scope of the franchise, *i.e.,* matters open to determination by the voters, also could not be limited in any way.

B.

Section 2012 is based on a sound rationale intimately connected with, and essential for, the operation of the affected part of the State School System.

As residence is a reasonable limitation on the qualification to vote in most if not all elections, so a limitation of the right to vote in local school district matters *to the patrons of such local schools,* is a distinction reasonably related to the purpose to be achieved.[9] Such purpose is:

1. To make sure that only those persons vote who either actually use the administrative services involved, or those who are *assessed* for payment of such services (actual payment of a tax is not required under New York State Law to qualify for the vote). The public school sys-

[9] *Cf. Doremus* (342 U. S. 429), where Mr. Justice DOUGLAS, in a dissent joined by Justices REED and BURTON, stated (p. 435):

> "There is no group more interested in the operation and management of the public schools than the taxpayers who support them and the parents whose children attend them."

Emphasis on the rights of parents may be found in the following sentences from the opinions of the Court (pp. 432, 433):

> "However, it was agreed upon argument here that this child had graduated from the public schools before this appeal was taken to this Court. Obviously no decision we could render now would protect any rights she may once have had . . ."

tem is too vital a tool in the life of our body politic, to let its administration be influenced by people who have no possible actual and practical interest in, or concern or contact with the same—whose interest can be no different from the interest of a non-resident of the school district involved.

The importance of education in the life of our States and Nation can not be overstated. It is precisely for that reason that this State legislation is designed to leave decisions in this vital area to those most directly affected by the operations of the education system, those having the greatest concern with and awareness of its needs and problems. Even at that, the battle for good education is a most difficult one and must continuously overcome a multitude of obstacles. In areas, for instance, where lakes, rivers or beaches bring in summer homes, it has traditionally been difficult to keep out persons who, while owners of such homes and hence taxpayers, are nevertheless not residents but attempt to vote so as to keep school taxes low. In other districts where there are more taxpayers than parents, it has often been next to impossible to provide the financial basis for excellence in education—and yet, those persons who directly pay a large share of the cost thereof, can not and should not be excluded from the franchise. The New York Legislature over the many decades, has consistently felt that it is undesirable in such an often precarious balance of interests to open the door to those whose interest in such excellence can be but theoretical. The same reasons that support limitation of the franchise to residents, apply with equal force to the limitations of Section 2012 (see *Spitzer, supra*).

2. The second rationale for Section 2012 is to make sure that party political considerations stay out of the school

system. The difference in voting qualifications for these school districts constitutes the first line of defense against encroachment of party political procedures and considerations. If this were to be changed, the next step, inevitably, would be attempts to save the expense of the school vote taking place at a time other than the general elections, and to seek legislation to have such vote take place at the time of and as a part of the general elections. This in turn would throw the school system into the party political cauldron, contrary to a basic principle existing in the State from the beginning of school district organization in 1812, *and which has been highly effective in terms of the quality of the State Education System.*[10]

C.

Questions relating to the wisdom of Section 2012 should be left to the political processes which are adequate, available and actually in progress.

The detailed administration of education is clearly a matter of State concern, does not offend the United States Constitution in any way and therefore should be left to the regular political processes of the State.[11]

---

[10] When the voting qualifications for the smaller 56 city school districts were changed from those of § 2012 to those of § 2603 (by L. 1952, ch. 182), almost immediately several bills were introduced to change the date of city school district elections to the date and time of the general elections in November. Three of these bills reached the Governor's desk and were vetoed (S. I. 2880 of 1952 and S. I. 811 and S. I. 1835 of 1953, the latter two with memorandum which is reproduced as Appendix B). So far such attempts have been successfully met.

[11] It is pertinent to note here that, *even on the federal level,* changes in voting qualification, have traditionally and properly been left to the political processes: the inclusion of women in the suffrage was effected by Constitutional Amendment rather than by the Judiciary, as was the similar inclusion of the Negro.

As a matter of fact, the very question here presented was, and is presently, under consideration in three areas:

1. The New York State Constitutional Convention of 1967 proposed a new State Constitution which was rejected by the voters of the State on November 7, 1967. Included in this proposed Constitution was Article II, Sections 1 and 2 dealing with Suffrage. Had this Constitution been adopted the question before the Court would have become moot (*Doremus* v. *Board of Education,* 342 U. S. 429, 432, 433; *United States* v. *Hamburg American Line,* 239 U. S. 466, 475, 476; *California* v. *Railroad,* 149 U. S. 308, 314), as the provisions of this Article required the elimination of the Section 2012 special voting qualifications.

2. As pointed out in item III. of "Background Facts," the State Legislature has already acted on a part of Section 2012 which appellant and the dissent below criticize. Laws of 1968, Chapter 730, effective June 16, 1968, add the spouses of a renter, etc., to the school patrons qualified to vote (see Appendix).

3. A Joint Legislative Committee is presently working on a revision and simplification of the New York State Education Law and is considering elimination of § 2012, which if finally adopted by the committee, will then be submitted to the State Legislature, so that even though the proposed Constitution was defeated this question will then come before the State Legislature for action. If such action is taken, the question will become moot.

There is thus no reason for the Federal Courts to intervene in a matter of purely State concern which is even now under consideration through the State's political processes.

Such processes are adequate, available to appellant and in fact actually in progress.

Appellant has the full franchise as it relates to the election of State legislators. Thus the political processes which can change the provisions of Section 2012 are completely open to him. This clearly distinguishes the cause at bar from *Reynolds, Carrington* and other cases where the dilution or disfranchisement diminished or denied access to the political processes.

It is submitted that for this reason also the judgment below must be affirmed.

D.

The frivolity of the complaint is highlighted by the contrast between appellant's complete lack of injury and the most serious damage that the extraordinary remedy of injunction here asked for, would do to the affected part of the New York State School System, if granted.

Appellant seeks the extraordinary remedy of injunction against the enforcement of a state statute governing the voting qualifications in a numerically large number of school districts, potentially involving several million persons. If the injunction were to be granted, since the Federal Courts can not legislate, especially in an area of State law, and since the New York State Election Law is not applicable in New York school districts, there can not be any substitute provision of law governing voting qualifications in these school districts in such case, until such time thereafter as the New York Legislature can and does take action. For various reasons this could be a protracted period of time. During such period no school district meetings or elections could be held, no matter how urgent a need therefor might arise in various areas of the state, in relation to school building construction, filling vacancies on school boards and other matters.

When the non-existing interest of appellant and the total lack of injury to him is compared with that grave result, the insubstantiality, to the point of frivolity,[12] of his claim becomes readily apparent.

CONCLUSION

The complaint herein is wholly without substance.

For all the foregoing reasons it is respectfully submitted that the appellant presents no substantial question for the decision of this Court, that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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[12] 259 F. Supp. 164, 167.

Appendix A

CHAPTER 730

STATE OF NEW YORK

S. 3684 A. 5282

SENATE—ASSEMBLY
February 14, 1968

IN SENATE—Introduced by Mr. B. C. SMITH—read twice and ordered printed, and when printed to be committed to the Committee on Education

IN ASSEMBLY—Introduced by Mr. W. L. BURNS—read once and referred to the Committee on Education

AN ACT

To amend the education law, in relation to voting by spouse of tenant

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph a of subdivision three of section two thousand twelve, as amended by chapter four hundred ninety-seven of the laws of nineteen hundred fifty-six, is hereby amended to read as follows:

a. Owns or is the spouse of an owner, leases, hires or is in possession under a contract of purchase *or is the spouse of one who leases, hires or is in possession under a contract of purchase* of, real property in such district liable to taxation for school purposes, but the occupation of real property by a person as a lodger or boarder shall not entitle such person to vote, or

§ 2. This act shall take effect immediately.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

Appendix B

GOVERNOR'S VETO MEMORANDUM—1953

(From N. Y. Legislative Annual, 1953, p. 368)

Educ. Law, city elections, school propositions
Educ. Law, school elections, cities, hours

S. I. 1835, Pr. 1940, McCullough
S. I. 811, Pr. 845, McCullough

For more than one hundred years our laws have for the most part maintained a separation between school district elections and general elections. These bills would permit the submission of city school district propositions at a general city election. This would mean that proposals for bond issues, the purchase of school sites and other important school matters would be joined with all of the other political issues before the electorate on election day. School matters would be submerged in the issues attendant upon national, state and municipal political campaigns. Concerning the proposal the New York State School Boards Association has written as follows:

> "From the standpoint of general policy, our Association has felt that steps should not be taken to place school matters before voters at the time of a general election. Experience has indicated that it is better to consider school matters at regular school elections or at special elections which are not coincident with the general election.

"Such proeedure has stood the test of time. There are those who argue that some money could be saved by holding school elections at the time of the general elections and we suspect this might be so. However, such a monetary advantage to be gained must be compared with the disadvantages which might come from mingling school problems with more political questions."

Disapproval of the measures is also strongly urged on these grounds by the State Education Department.

Appendix C

DECISIONS

COURT OF APPEALS

NEW YORK LAW JOURNAL—MARCH 15, 1965

* * *

243. *Turco, ap.* v. *Union Free School District, res.*—Motion to dismiss the appeal granted and the appeal dismissed, with costs and $10 costs of motion, upon the ground that no substantial constitutional question is presented.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 258

MORRIS H. KRAMER,

Appellant,

—v.—

UNION FREE SCHOOL DISTRICT No. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 258

MORRIS H. KRAMER,

Appellant,

—v.—

UNION FREE SCHOOL DISTRICT No. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

Opinions Below

Kramer v. *Union Free School District No. 15, etc.*, 282 F. Supp. 70 (E. D. N. Y. 1968); *Kramer* v. *Union Free School District No. 15*, 379 F. 2d 491 (2d Cir. 1967); *Kramer* v. *Union Free School District No. 15*, 259 F. Supp. 164 (E. D. N. Y. 1966). The opinions are set out in the Appendix, pp. 31, 18, and 11, respectively.

Jurisdiction

Jurisdiction of this Court to review the determination of the three judge statutory court of the United States District Court for the Eastern District of New York rests upon 28 U. S. C. Sec. 1253. The judgment was entered by the three judge court of the United States District Court on March 14, 1968; notice of appeal was filed on April 4, 1968; probable jurisdiction was noted on October 14, 1968.

Statute Involved

Education Law of the State of New York, Section 2012

A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is: 1. A citizen of the United States. 2. Twenty-one years of age. 3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

(a) Owns or is the spouse of an owner, leases or hires, or is in the possession under a contract of purchase of, [or is the spouse of one who leases, hires or is in the possession under a contract of purchase of][1] real property, in such district liable to taxation for school purposes, but the occupation of real property by a person as lodger or boarder shall not entitle such person to vote.

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[1] Bracketed material added by Laws of 1968, Chapter 730, effective June 16, 1968.

(b) Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

(c) Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting.

No person shall be deemed to be ineligible to vote at any such meeting by reason of sex, who has the other qualifications required by this section.

Question Presented

Whether Section 2012 of the New York Education Law, which denies appellant his right to vote in School District Elections, violates the Equal Protection Clause of the Fourteenth Amendment, and the First Amendment as made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

Statement of Facts

Morris H. Kramer is a 31 year old stockbroker who resides in Atlantic Beach, New York, which is in the confines of Union Free School District No. 15. For over 20 years he has resided there in the home of his parents. He is a citizen of the United States and has voted in federal and state elections since 1959.

Mr. Kramer attempted to register to vote on April 25, 1965, for the forthcoming school district election in Union

Free School District No. 15. However, his application was rejected by appellees because he admittedly failed to meet the additional voting qualifications of Section 2012(3)(a), (b) or (c) of the New York State Education Law.

Thereafter appellant instituted this proceeding to declare Section 2012 of the Education Law of the State of New York unconstitutional and to restrain its enforcement. After intermediate proceedings which resulted in the second and third opinions referred to above, a three judge statutory court granted appellees' motion to dismiss the complaint, Judge Weinstein dissenting. Notice of appeal having been duly filed, this Court noted probable jurisdiction on October 14, 1968.

ARGUMENT

POINT I

Section 2012 of the New York State Education Law denies appellant and others similarly situated the equal protection of the laws.

Both the United States and the New York State Constitutions set forth certain age, residence and residency requirements for voting, none of which are challenged by appellant and all of which appellant has fulfilled for a decade. However, the statute in dispute, Section 2012 of the New York State Education Law which sets forth qualifications for voting in elections for school board members and school district budgets goes beyond these limitations and disenfranchises all but three groups of persons: (i) owners of property in the school district subject to

taxes and their spouses; (ii) apartment leaseholders,[2] and (iii) parents or guardians of children attending district schools.

By these provisions, all or some of the following groups of voters, not property owners or tenants are disenfranchised: (i) senior citizens and others living with children or relatives; (ii) young adults (such as appellant) residing in family homes; (iii) clergy, military personnel, and others living on tax exempt property; (iv) boarders and lodgers; (v) parents of children who have not attended a district school for the period specified in the law either because the children were below school age or because the children attended parochial or private schools or public schools outside the district.

In *Carrington* v. *Rash*, 380 U. S. 89 (1965), the Court applied the equal protection clause to a state's restriction on the right of a resident to vote in any election merely because he was in the armed services. In *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), the principle was extended to outlawing the poll tax. Here the Court is called upon to determine whether this principle is applicable to voting in a school election and whether the qualifications established by New York are defensible.

The problem of the selection of school boards came before the Court in *Sailors* v. *Board of Education*, 387 U. S. 105 (1967). There, elected officials selected the members of the body that controlled the county school system. This was upheld on the theory that a state could provide that such "non-legislative" officials could be appointed. But the

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[2] And their spouses, effective June 16, 1968.

Court expressly noted (p. 111) that no "constitutional complaint" had been raised with respect to the election itself.[3]

Here, however, no such quasi-appointive method was used. New York law provides for direct election of members of Union Free School District No. 15, and the case deals directly with such an election. Appellant was denied the right to participate because, although an adult resident of the district and a citizen otherwise qualified to vote, he did not come within the categories set forth in Election Law §2012: He was neither owner or lessee of property in the district or the spouse of one, nor the parent or custodian of a child attending school in the district.

As was noted at an earlier stage of this case:

> "It may be true, as the appellees argue, that the state need not permit its citizens to vote on the matter with which §2012 is concerned. See *Sailors* v. *Board of Education, supra.* However, as the Supreme Court has held 'Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the equal protection clause of the Fourteenth Amendment.' *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 665 (1966)." 379 F. 2d 491, 494; App., p. 21.

The majority of the court below upheld the classification scheme of §2012 on the theory that it was reasonable

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[3] Appellees in their Motion to Affirm suggest that there is a distinction between the small unit of government at issue here and "a general government unit" (Motion to Affirm, pp. 35-38) which will support the restrictions on the right to vote contained in §2012. But the equal protection clause recognizes no such distinction, see *Brown* v. *Board of Education,* 347 U. S. 483 (1954). If it did, States which are dissatisfied with this Court's decisions relating to racial segregation or legislative apportionment, could evade them by fragmenting their general legislative functions into specific functions controlled by separate bodies.

for the state to restrict the right to vote to those directly affected by school taxes and school policies. Thus taxpayers and parents, all qualified under the law, were considered to have so preeminent an interest as to justify exclusion of other residents.

The fallacy of that approach was exposed in the dissent below, where Judge Weinstein pointed out that there were other vital considerations which require participation by all residents qualified to vote in general elections. He noted the interest of all such persons in the cost of education, an increasingly large part of which is now borne by county, state, and federal governments, to the support of which appellant, as well as other adult residents now excluded from school elections, contribute. He noted also the impact of taxes on local prices for goods and services. He underscored the importance to all persons in a community of the policies a local school board might adopt with regard to school matters, particularly to such things as libraries, adult education, recreational facilities, and entertainments.

We submit that his arguments are unanswerable and that it will not do to say, as do the majority, that there was a rational basis for the classification. This Court has repeatedly said that where voting rights are involved any restrictions must be closely scrutinized: *Reynolds* v. *Sims,* 377 U. S. 553, 562 (1964); *Wesberry* v. *Sanders,* 376 U. S. 1, 17 (1964); *Harper* v. *Virginia Board of Elections, supra.*

What was said by Mr. Justice White in *Avery* v. *Midland County,* 390 U. S. 474, 481 (1968) is applicable here:

> "• • • In a word, institutions of local government have always been a major aspect of our system, and

> their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens. We therefore see little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds* v. *Sims,* between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties."

The crucial question, of course, is whether the so-called "interest" element relied upon by the majority can constitutionally control the choice of electors. As the Court said in *Williams* v. *Rhodes,* 37 U. S. L. Week 4001, 4003 (October 15, 1968):

> "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances of the law, the interests which the State claims to be protecting and interests of those who are disadvantaged by the classification."

Under that standard the balance must fall against the state here. For the interest of those disadvantaged clearly outweighs any possible interest the state might have in restricting voting as it has done.

The decision below rests upon the narrowest possible basis, namely, financial interest of taxpayers and direct interest of parents of children attending the schools, leaving out of account altogether the great interest of all the other persons in the community in the conduct of its schools. See, e.g., *Taylor* v. *Board of Education,* 294 F. 2d 36 (2nd Cir. 1961). Particularly in today's turbulent times the character of education and its impact on young children

attending schools is of the greatest importance to all persons in the community. No one who has lived through the recent events which have erupted in some of our colleges and high schools in various parts of the country can close his eyes to this aspect of the problem.

This general interest of the community in school matters is perhaps most dramatically illustrated by what has happened in the City of New York in the fall of 1968 where a strike of teachers, because of conflicts with the city-wide and certain local boards, has seriously affected everyone. Indeed, the racial tension generated by this strike will have far-reaching repercussions. The decisions taken by local boards in various parts of the country may have grave consequences to the entire population. Consequently, the election of the members of such boards should be by the widest possible electorate in each community.

Judge Weinstein in his dissent (282 F. Supp. at 76; App., pp. 44-45) eloquently dealt with one aspect of this problem:

> "Headlines daily furnish examples of the deep passions stirred by debate on control of educational policy. One of the substantial pressures on peaceful race relations has come from the problems created by integration of schools. In the North as well as the South, people have at times abandoned the ballot and the courts and taken to the streets in an attempt to settle these problems. The right to vote in school board elections is the right to participate in attempts at controlling deep currents in our society which can nurture or destroy."

He further pointed out that appellant is affected by the amount of the school tax because both federal and state

governments pay part of the local educational expenses and therefore influence the amount of income tax which appellant has to pay. He noted that residents were also financially affected because of the circumstance that the amount of taxes paid by the people of the community affects the price of goods sold and services rendered there. But even if we make the completely hypothetical assumption that appellant had no interest whatsoever in the actions taken by his local school board, he still would have the right of franchise because under the equal protection clause, and indeed under the republican form of government clause, voting is a matter of right and not of interest. It is "the essence of a democratic society." *Reynolds* v. *Sims, supra,* at 555. Quite simply, under the equal protection clause the right to vote may not be limited beyond reasonable citizenship, age, residency and literacy requirements, all of which are met by appellant.

It is also important to bear in mind that only qualified voters can take part in school district meetings which are vested with a wide range of powers which effect the community at large including designating schoolhouse sites and setting taxes (Education Law §§2021, 2022), providing for the education of students outside the district (Education Law §2040), and providing for the education of children of migrant laborers (Education Law §2040-a) and of children from outside the district (Education Law §2041).

Finally, property qualifications have increasingly been discredited as prerequisites for the exercise of the right to vote. Thus, the New York Court of Appeals in *Landes* v. *Town of North Hempstead,* 20 N. Y. 2d 417 (1962), voided a requirement of property ownership for the purpose of holding office in a town. A three-judge district court in the

Southern District of New York unanimously struck down a provision of New York's Village Law which restricted voting on certain village matters to property owners. *Pierce* v. *Village of Ossining,* 68 Civ. 4150 (S. D. N. Y. Nov. 1, 1968), 37 U. S. L. Week 2257. It is interesting, also, that the proposed New York State constitution submitted to (but rejected by) the voters at the general election of 1967 would have eliminated all of the restrictive requirements of Section 2012 (see proposed Constitution, Art. II, Sec. 1).

POINT II

The impact of Section 2012 of the Education Law affects First Amendment rights.

This aspect of the case, which is included in the Question Presented in the Jurisdictional Statement (p. 2) and in the Question Presented herein, was briefly discussed by Judge Weinstein (282 F. Supp. at 85; App., pp. 62-63). School elections are often a focal point in local communities and afford the most immediate method whereby points of view can be implemented. As Judge Weinstein pointed out, parents who send their children to parochial or private schools are excluded from this community activity, as are all of the other persons disqualified by the restrictive voting.

CONCLUSION

It is submitted that the decision appealed from should be reversed and Section 2012 of the New York State Education Law held unconstitutional in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and that a decree should be entered restraining appellees from enforcing this provision.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 258

MORRIS H. KRAMER,

Appellant,

against

UNION FREE SCHOOL DISTRICT No. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR NEW YORK ATTORNEY GENERAL, INTERVENOR-APPELLEE

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IN THE

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OCTOBER TERM, 1968

No. 258

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LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR NEW YORK ATTORNEY GENERAL, INTERVENOR-APPELLEE

The Attorney General of the State of New York, has been an intervenor (pursuant to New York Executive Law § 71) in this litigation since its inception.

Question Presented

The question presented is whether New York Education Law § 2012, which restricts the right to vote in school district elections to persons *in loco parentis* and to classes of persons most directly subject to school district taxes, violates the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

New York Education Law, § 2012, in restricting the right to vote in school elections to those primarily interested in such elections, provides a reasonable classification which does not violate the equal protection clause.

(1)

The appellant concedes (pp. 5-6) that the States need not provide for the election of school boards. *Sailors* v. *Board of Education,* 387 U. S. 105 (1967).

In his jurisdictional statement (p. 7), appellant insisted that elections of school boards having been provided for in certain localities in New York, this Court's decisions in *Carrington* v. *Rash,* 380 U. S. 89 (1965) and *Harper* v. *Virginia State Board,* 383 U. S. 663 (1966), had abrogated any standards of "rationality" that might be employed by New York or any other State in classifying persons eligible to vote in a school district election.

The appellant had overstated his case. In *Carrington,* the majority explicitly recognized that Texas had "unquestioned power to impose reasonable residence restrictions on the availability of the ballot" (380 U. S. 89, 91). This Court merely held it to be an *invidious discrimination* for Texas to provide that no serviceman could ever acquire a voting residence in the State so long as he remained in service (380 U. S. 89, 92, 96). Indeed, the

majority of this Court took pains to "emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence" (380 U. S. at p. 96).

In *Harper* (*supra*), this Court held a poll tax to be unconstitutional. The "affluence of the voter or payment of any fee" were held to be inappropriate standards which bore no relation to voter "qualifications" and were offensive, as "invidiously discriminating" against those persons required to demonstrate such affluence or to pay such fee (383 U. S. 663, 666, 667). But the Court recognized that the States still had an interest in fixing qualifications which were "germane to one's ability to participate intelligently in the electoral process" (383 U. S. at p. 668).

What the appellant had failed to observe with reference to "qualifications" is that there is a very reasonable relationship, in the categories of "interest" established under Education Law § 2012 of the persons permitted to vote for the members of the school board, to the administrative functions of a local school board. Those permitted to "have a voice" in the election are those whom the State could understandably deem to be the most intimately interested in actions taken by the school board—1) the parents of children attending school in the district, and 2) the real estate owners and lessees "liable to taxation for school purposes."

This is not a "one man, one vote" case, one involving a vote dilution problem; but a "qualification" case involving intensity or depth of interest as a proper standard for the qualification of a voter in the election of local officials performing an administrative task of special interest to those qualified voters. In *Sailors* v. *Board of Education*, 387 U. S. 105, 111, this Court observed that a State could appoint such officials or elect them or combine the elective and appointive systems. In this "right to vote" case,

there appears to be no basis for challenging the reasonableness of election standards which restrict that right to those persons most directly affected and those deemed to be most directly concerned by the actions of the local administrative body. Indeed, this Court, in sustaining a *residence* requirement as a reasonable type of election "qualification", has demonstrated the propriety of State action in insisting upon an intimacy of interest in the subject matter of an election, as a basis for classification. *Pope* v. *Williams,* 193 U. S. 631, 632 (1904); *Lassiter* v. *Northampton Election Bd.,* 360 U. S. 45, 51 (1959). Furthermore, no substantial federal question was found to exist even where the classification of persons permitted to vote in a municipal election was extended to *non-resident* owners of real property in the municipality. *Spahos* v. *Mayor and Councilmen of Savannah Beach,* 207 F. Supp. 688 (So. Dist., Ga., 1962), aff'd *per curiam* 371 U. S. 206 (1963); and see *Glisson* v. *Mayor and Councilmen of Town of Savannah Beach,* 346 F. 2d 135 (5th Circ., 1965). The broad and pervasive general interest of all United States residents and citizens in the subject of education does not and need not, however, make all such residents and citizens eligible to vote in every local school district election.

The 1967 New York Constitutional Convention, whose work was rejected by the voters of the State, proposed a broad reclassification (Article II) of the rights of persons to vote in various types of elections throughout the State, including school board elections. But the 1967 voter response, rejecting the entire product of the Convention submitted to it on a take-it-or-leave-it-all basis, did not and does not prevent the Legislature from exercising its wisdom to readjust the classifications of voters it deems entitled to vote in school district elections. See Report No. 4 dated March 4, 1967, entitled "The Right to Vote", prepared by the Temporary State Commission on the Constitutional Convention. Indeed, by L. 1968, ch. 730, effective June 16, 1968, the right to vote in school district

elections has been extended, during the pendency of this action, to the "spouse of one who leases, hires or is in possession under a contract of purchase".

(2).

The appellant now makes no such direct attack upon the "reasonableness" of New York's classification. He now merely asserts that "where voting rights are involved any restrictions must be closely scrutinized" (Brief p. 7). Appellant's close scrutiny becomes dogmatic, however, when he further asserts that the interest of those restricted from voting "clearly outweighs any possible interest the State may have in restricting voting as it has done" (Brief p. 8). To avoid the appearance of being completely dogmatic in his conclusion as to the weight to be given to the factors he has so arbitrarily balanced, the appellant refers to recent turbulence, tensions and the New York City school strikes which have affected "the community in the conduct of its schools" (Brief pp. 8-9). These circumstances do not constitute "close scrutiny". Indeed, the appellant, in referring to these extra-record considerations, has completely overlooked the fact that these same circumstances might reasonably lead legislators to avoid school rule by "mass demonstration." Or it might equally reasonably lead legislators to conclude that even residence and age requirements (not challenged by the appellant) should be altered.*

Finally, appellant urges that even if the element of "interest" in actions taken by a school board were to be eliminated from consideration, he would have an absolute right to vote, since "voting is a matter of right and not

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* We shall seek to avoid complication of this brief by any consideration of the many problems and factors that may require evaluation by the Legislature in the resolution of the New York City school decentralization situation.

of interest" (Brief p. 10). Appellant relies upon *Reynolds* v. *Sims,* 377 U. S. 553, 555 (Brief p. 10), a case which we know to have dealt with the problem of the dilution of voting power, rather than that of voting qualifications. Then, rather inconsistently, appellant recognizes again that the "right to vote" may be qualified by "reasonable citizenship, age, residency and literary requirements" (Brief p. 10). Thus, he concedes that the "right" to vote is not absolute.

New York has been altering its approach to the significance to be attributed to property ownership in the evaluation of voting qualifications. This altered approach has not only been shown judicially, as in *Landes* v. *Town of North Hempstead,* 20 N. Y. 2d 417 (1967), but also legislatively, in the elimination of property ownership as a qualification for voting or for other public service. See L. 1967, Ch. 49 (jurors) L. 1968, Ch. 730 (spouse of tenant, re school district election); and L. 1968, Ch. 767 (re eligibility for town and village office); and *supra* (p. 4).* But the task of making judgments as to reasonableness; and of balancing the interest of the community in the maintenance of orderly school district elections against the interest of any individual in voting in such elections should clearly remain with the Legislature. It must continue to be the reasonable appraiser of the qualifications of voters.

Unless the Legislature is permitted to set up reasonable qualifications for voters, the floodgates will be lowered to permit a torrent of possibilities that can breed chaotic conditions in the conduct of elections. An eight-year-old California student may contemplate moving into appellee's school district; an up-state apple picker may take up

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* The New York Attorney General has been endeavoring to procure the elimination of property qualifications from an assortment of New York Statutes, 159 N.Y.L.J. (No. 14), front page, January 19, 1968. See Appendix to this brief, constituting our memorandum in support of L. 1968, Ch. 767.

temporary summer employment in the district, with the fervent hope that the school children in the district are being inculcated with educational principles that do not provide for his scalping or mutilation during the period of his temporary employment in the district; or a New Jersey mother may desire to vote more funds for the improvement of education in this district, so that it will be advantageous to move into the district with her progeny at a future date.

Some day the Legislature may deem it appropriate to permit anyone who takes the trouble to evince an interest in the outcome of a school board election to the extent of appearing at the polls on election day, to vote in such an election. Until the Legislature decides that such a display of interest is sufficient, the Legislature should not be deprived of its power to evaluate reasonable qualifications for school board elections.

POINT TWO

The reasonableness of New York's classification of school district voter's qualifications finds ample support in the opinions of the many federal judges who have passed upon this cause of action.

We may summarize the various District and Court of Appeals views outlined below as indicating a general conclusion that New York's classification has a reasonable basis. Only the dissenting opinion by Judge Weinstein, in his finding that the classification did not meet the stricter standards of classification he deemed applicable to voting rights cases, contains a contrary conclusion.

(1)

The District Court, upon the plaintiff's application to convene a three-judge court, denied that application upon the ground that the "distinctions drawn by the legislature

of the State in § 2012 of the New York Education Law are so clearly reasonable and plaintiff's claim so obviously without merit that it can only be characterized as frivolous" (ZAVATT, Ch. J., Appendix, p. 17).

(2)

The Court of Appeals, upon reversal of the District Court order declining to convene a three-judge court, merely held that the question presented was not "frivolous." Circuit Judge HAYS, however, writing for reversal, took pains to "express no view as to what should be the ultimate disposition of plaintiff's claim" (App., p. 21); holding merely that he did not consider "frivolous" the claim that an unreasonable discrimination resulted from a voter classification system "which disregards plaintiff's interest in issues of public education while recognizing a taxpayer's economic interest" (App., p. 22).

The Court of Appeals declined to hold that the decision in *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), which involved voter qualifications for statewide elections, controlled this case "which is concerned with local elections on limited issues" (App., p. 22). In holding the issue presented not to be "frivolous", Judge HAYS merely observed that public education was "a matter of general concern to all citizens" and it was "not self-evident that the right to vote on questions of public education can properly be denied to others while permitted to parents and to those having school children living with them" (App., p. 23).

Circuit Judge KAUFMAN, although concurring with Judge HAYS that the question presented was not "insubstantial", cautioned that "it should not be inferred from my concurrence in the result that I believe the converse is true and that I view appellant's claim as meritorious" (App., p. 24).

Chief Judge LUMBARD dissented from the reversal order, stating that he saw "no need for three judges to consider a claim so patently without merit" (App., p. 25). He deemed it a sufficient answer to plaintiff's claim that (App., p. 26):

> "New York's conclusion that parents and taxpayers are more vitally interested in the administration of public schools than others is plainly not arbitrary; for example, these groups, and generally no others, have been accorded standing in the federal courts to challenge the operation of the public schools. See *Doremus* v. *Board of Educ.*, 342 U. S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952)."

After distinguishing this Court's decision in *Harper* (383 U. S. 663, *supra*), Chief Judge LUMBARD further wrote (App., p. 30):

> "we do no service to anyone by dignifying a claim so patently without merit by requiring three judges to convene and consider it, simply because my brothers do not think it insubstantial. As another panel of this court recently said, 'When the single district judge has denied the injunction and three circuit judges are convinced that the pleadings show the claim to lack merit, they accomplish little save elegantia juris by reversing because they are not completely certain that the lack was so obvious as to have warranted dismissal by one judge rather than three.'" *Green* v. *Board of Elections*, 2 Cir., 380 F. 2d 445 (June 13, 1967).

The implication of the last quoted statement is that the Court of Appeals, if it had been passing on the merits of plaintiff's claim, would have concluded that the complaint herein should have been dismissed.

(3)

Two of the three members of the three-judge panel also concluded that plaintiff's claim lacked merit. Circuit Judge Moore and District Judge Bartels wrote (App., p. 38):

> "The defendants argue that it is not unreasonable for the legislature to determine that the local school system should be run by those who have a direct interest in it, namely, those who have to pay for it and those who benefit from its services. We are of the opinion that this argument is well taken when applied to the narrow issue before us—the denial of the franchise to those school district residents whose interest in educational policy and the financing thereof is at best indirect and weak, compared to the concern of those who are franchised."

They further observed (App., p. 39):

> "The quality of public education is controlled in large part by the personal interest of those members of the community who are most vitally affected thereby. The group most interested should be the parents."

They also noted these facts (App., pp. 39-40):

> "The geographic areas in which the Section 2012 school districts function differ substantially from those of the large cities where there are no Board of Education elections. In the smaller communities, there should be found a greater identity of interest with education on the part of the parent and taxpayer groups, the parents because of their supervision over their children, and the taxpayers because of their responsibility for the school capital and operating budgets. Persons in plaintiff's category obviously

> do not have the same permanency of attachment or interest in the school district as those in the other categories."

They concluded (App., pp. 40-41):

> "schools are erected and operated primarily for the education of children, and parents and those closely allied to the community by leases or property ownership are obviously the most interested and affected. The right of suffrage may be limited where the rationale of the exclusion is so directly related to the objective to be achieved. See *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45 (1959); *Pope* v. *Williams*, 193 U. S. 621 (1904). Therefore, the Legislature, in acting within its power to fix voter qualifications, did not discriminate in an unreasonable or unrealistic manner. Quite to the contrary, the selection of the parent and taxpayer groups definitely would appear to be within the permissive limits of power still preserved by state legislatures as specified both by the Supreme Court and the New York Court of Appeals."

The dissenting District Judge (WEINSTEIN, D. J.) wrote a long opinion against dismissal of the complaint herein, predicated upon the proposition that local school boards exercise a considerable portion of governmental power and that plaintiff was being "excluded from participation in control of this locus of governmental force" (App., p. 43).

Judge WEINSTEIN viewed the reapportionment cases, *Harper* and *Carrington* as making it "clear that equal protection requires a higher standard for classifications denying or diluting a citizen's vote than has traditionally been required for legislative classifications involving less fundamental political matters" (App., p. 55). He then analyzed the distinctions made under section 2012 and found them to be arbitrary, because: 1) they discriminated against non-parents who did not either own or rent prop-

erty (App., p. 56); and against parents whose children did not meet the statute's requirements of attendance in the district's public schools (App., p. 59); 2) the overall scheme was improper; and 3) the plaintiff had no adequate remedy by way of securing the repeal of Section 2012, since the section applies only to one-third of the State's school districts and most citizens in the districts to which the section applies are entitled to vote (App., pp. 61-62).

Judge Weinstein further wrote (App., p. 63) that, despite an earlier New York decision sustaining the state constitutionality of Section 2012 in *Turco* v. *Union Free School Dist. No. 4*, 43 Misc. 2d 367, aff'd 22 A. D. 2d 1018 (2d Dept., 1964), *app. dism.* 15 N. Y. 2d 967 (1965), the recent decision in *Landes* v. *Town of North Hempstead*, 20 N. Y. 2d 417, "suggests that New York's highest court is ready to find that New York's Constitution outlaws property qualifications for voters". The *Turco* decision has not, however, been overruled. Moreover, it should be noted, that the dissenting District Judge had previously written (Weinstein, "The effect of the federal reapportionment decisions on counties and other forms of municipal government", 65 Col. L. Rev. 21, 35):

> "There remain, however, some troublesome questions in school districts where voting is restricted to homeowners, or to home-owners and parents. Can the tenant without children object on the ground of lack of equal protection? Can the parent object to the childless homeowner's vote on the ground that a nonuser of the service is exercising control? Can the voter without children object that a non-homeowning parent is not paying for the service while exercising control? While all of these questions are interesting, most courts would probably reject such possible lines of attack out of hand."

In this same law review article, written in 1965, the dissenting judge had also recognized that "Representation in proportion to population presents an issue different from

limitations on the right to exercise the franchise'' (65 Col. L. Rev: 21, 35, footnote 58).

(4)

When so many federal judges (the two majority judges below, Circ. Judge Moore and District Judge Bartels; Chief Judge Lumbard of the Court of Appeals and Chief District Court Judge Zavatt, in express terms; as well as Court of Appeals Judge Kaufman, at least, by implication) have been able to find a rational basis for a statutory classification, it would seem inappropriate for this Court to hold the classification to have been adopted with no rational basis. *McGowan* v. *State of Maryland,* 366 U. S. 420, 425-426 (1961).*

CONCLUSION

The judgment appealed from should be affirmed.

Dated: New York, New York, December 20, 1968.

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* Since the appellant presented no First Amendment questions in his complaint (Appendix, p. 6), we do not regard it as strange that appellant (Brief, p. 11) has shown such meagre interest in the suggestion by the dissenting judge below that First Amendment rights are impaired by Education Law, § 2012. Until a different suit is instituted testing such a theory, we shall refrain from discussing the merits of the suggestion made by District Judge Weinstein.

APPENDIX TO BRIEF

Memorandum of State Department of Law.

McKinney's Session Law News
July 25, 1968—No. 6, pp. A-160-161

This bill amends § 23 of the Town Law to eliminate the present requirement that every elective town officer at the time of his election and throughout his term of office must be the owner of record of real property in the town. It also repeals § 23-a of that law, which section now sets forth the manner of proving ownership of real property. Both of these sections were declared unconstitutional by the Court of Appeals in the recent case of *Landes* v. *Town of North Hempstead,* 20 N. Y. 2d 417, 284 N.Y.S. 2d 441, 231 N. E. 2d 120 (1967), in which the Court of Appeals stated in part "* * * it is impossible today to find any rational connection between qualifications for administering town affairs and ownership of real property."

The bill also amends § 175, subd. 3, of the Town Law to remove the real property ownership requirement for holding the office of fire district commissioner, treasurer and secretary, and Section 211 thereof to remove the property ownership requirement to be commissioner of a special district.

Also amended by this proposal is § 4-404, subd. 1, of the Village Law to remove the property ownership requirement for mayor, trustee, member of any board of commission of a village, and Chapter 595 of the Laws of 1938 (See McKinney's Unconsolidated Laws, § 5854) to remove the real property ownership requirements for special fire districts.

Memorandum of State Department of Law.

Villages and special districts, including fire districts, would seem to be in the same classification as towns where the Court of Appeals declared unconstitutional a property ownership requirement to hold office. School districts have not been included in this bill because there are two alternatives to a property ownership requirement for holding office, namely, that of being a renter or the parent of a child in school. There is no indication whether the Court of Appeals would decide these requirements to be unconstitutional, whereas for the villages and districts covered by this bill it is reasonable to anticipate that the Court of Appeals would declare the property ownership requirements unconstitutional if the Legislature does not eliminate such requirements.

This bill is part of the legislative program of the Attorney General.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 258

MORRIS H. KRAMER,

Appellant,

v.

UNION FREE SCHOOL DISTRICT NO. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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Question Presented

Should not the District Court's decision and judgment be affirmed where the complaint does not present a substantial Federal question; where the matter is one left by the United States Constitution to the State, and no violation of any federally guaranteed rights and immunities is involved; where the highest State Court has already determined a matter which, in the absence of such a violation of federally guaranteed rights is one purely of State law; where the controversy involved is furthermore, a political controversy resting properly within the ambit of the

legislative function, and therefore not justiciable; and where, finally, previous decisions of the United States Supreme Court have foreclosed the existence of a substantial Federal question.

ARGUMENT

POINT I

The rationale of Section 2012 is exactly the same as that underlying the residence qualification in all elections.

1. This Court has held consistently that residence is a requirement for voting qualification which rests squarely within the legislative power of the states (*Carrington* v. *Rash*, 380 U. S. 89; *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45; *Pope* v. *Williams*, 193 U. S. 621).

2. The rationale of constitutional permissibility of state legislation in this respect is basically of a three-fold nature.[1]

a. The residence requirement is a necessary aid in the indentification of eligible voters, and to avoid double voting.

b. The residence requirement is important for the purpose of avoiding various election abuses such as the use of floaters, mass voting by transients, bringing in people from the outside for the purpose of improperly influencing the outcome of a local vote.

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[1] See *Massachusetts Senate Document No. 823, Legislative Research Council Report*, March 9, 1966; *Residence Requirements For Voting: 10 Years of Change*, W. Ross Yates of Lehigh University, an address prepared for delivery at the 1962 Annual Meeting of the American Political Science Association at Washington, D. C.

c. Most importantly however, the residence requirement serves to assure an intelligently informed electorate.[2] Only residence in a unit will expose a voter to the problems of the unit, the issues of importance to the unit and the candidates. Only residence assures that the voter acquires a stake in the community sufficient to stimulate responsible voting. Only residence will enable the voter to understand the local problems of importance to the unit.

d. Applying these principles to Section 2012, these apply with greatly increased force and necessity to today's school systems. The ever increasing complexity of the many interacting phases of the school system and structure make it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operations of the school system. The increasing complexity of state aid formulae, the interaction between state aid and school district reorganization, the expansion of knowledge and its influence on the curriculum, on teacher qualifications and on necessary equipment make it doubly important to have a fully informed electorate.

e. As residence in a unit of general governmental nature such as counties, cities, etc., is apt to assure such knowledge of general local problems, issues and candidates, so in a school district of the kind here involved it is vital to make sure that decisions are made by people who have full information about the basic educational issues involved (as distinguished from such peripheral and incidental details as whether or not concerts are given in the school for the inhabitants of the general area and whether or not adult education courses in basket weaving

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[2] Constance E. Smith, *Voting and Election Laws*, N Y. Oceania Publications, Inc., 1960.

or yoga are available). Many communications of school boards and school administrations are sent home to the parents through the pupils and are not broadcast to the general public, so that non-parents of public school pupils invariably will have less information available than such parents. In addition, it is apodictic that those persons, whose properties in the school district are assessed for payment through the local real property tax of the costs of rendering the services to the pupils and parents of the district, will have enough of an interest, through the burden on their pocketbooks, to acquire such information as they may need in order to try to evaluate the operations of the public school system and the reasonableness of expenditures in which they so heavily and directly participate even though they do not have children in the public schools for which this charge is made.

It can be argued of course that some individual citizens may have such an interest, and undoubtedly some of them do, even though they do not either receive such services or directly pay for them. At the same time we are here dealing with the legislative power of the state to legislate in relation to a vital function of the state, reserved to the state by the United States Constitution. It cannot be reasonably denied that limiting the vote on such a special purpose administrative operation to those persons best informed thereon is reasonably calculated to produce the best result that a legislative act can produce, based on the reasonable expectation of the reaction of men as shown by experience over the years.

Since the Legislature has found it desirable and reasonable to include in the franchise, in addition to the parents who actually use the services of the school district, also those who through the real estate tax directly participate

in providing these services,[3] there is, in a great many school districts in this category, a very serious conflict of interest between the parents and the real estate taxpayers which oftentimes, depending on local conditions and circumstances, makes the provision of adequate educational facilities and services most difficult. Such problems which are increasing throughout the state because of the increase of the general tax load (approximately 10% of school district budgets have been voted down during the last school year), should not be increased by adding to the electorate persons who have no direct interest of any kind in the operations of public schools and who cannot therefore be reasonably expected to devote to school problems the very considerable amount of time required for the understanding of the complex problems of today's school district. It is submitted that it is not only reasonable for the Legislature so to do, but that it is vital for the purpose of insuring the integrity of the educative processes in these districts, to the extent that legislative enactments can produce an informed electorate. The amount of money spent on elementary and secondary education today and the tremendous influence of such education on tomorrow's destiny cannot be overestimated. It is for this reason alone that the provisions of Section 2012 should and must be upheld.

3. The position of those "disfranchised" by Section 2012 is exactly the same as the position of the non-resident

[3] The inclusion of the parents in the franchise by the Laws of 1867, Chapter 406, was the result of the abolition, by the same enactment, of the so-called "rate bills" (tuition payments by all parents of public school pupils). It was this Chapter which made the public schools free in fact as well as in name (the "Union *Free* School Act" of 1853 failed to abolish these "rate bills" which were required from 1814 to 1867).

of a community who nevertheless spends a great deal of time in the community. A resident of the State of New Jersey for instance, who works in the City of New York and spends most of his working and recreation time in the City of New York, undoubtedly may have a very deep interest in the school system of the City School District of the City of New York. Events related to such school system may affect him deeply and personally. He may have an abiding interest in educational excellence of the City of New York. He may have unusual qualifications which he could bring to bear in aid of the educational system in the City of New York. Nevertheless, not being a resident, he has no voice, he cannot vote in the New York City school system. (It should here be re-emphasized of course that no one has a vote on school matters in the New York City school system, to which Section 2012 does not apply.)

With the increasing mobility of people throughout the United States, the interest that appellant has in the school system in which he happens to reside but in which he does not participate in any way as a parent or real estate taxpayer, can be no different from the interest that he has in good educational systems in surrounding districts (where he does not reside), in the nearest metropolitan district, (in which he does not reside) or in fact in the school systems of other states. The present vast migration from the South into New York and other northern states makes the interest of New Yorkers in the school systems of Mississippi and Alabama a very strong and vital interest. This does not however mean that a New Yorker can vote in Mississippi or Alabama.

In addition to those persons who reside in one place and work in another place such as the New Jersey resident referred to above who works in New York City, there are hun-

dreds of thousands of people throughout the country who are in a similar position because they are residents of United States Government enclaves, are engaged in navigation, are students at universities and colleges, are inmates of prisons, hospitals and other institutions. There are also those persons who maintain two or more homes. All these persons obviously may be "interested" and perhaps deeply concerned with the general governmental affairs of those places which are not their legal residence—an interest and concern which is identical with that of appellant herein—and yet they cannot vote in any elections in those areas where they spend so much time—simply because they are not residents of such places. If appellant's theories are right, all such persons are invidiously discriminated against by not allowing them to vote in local elections in the place of their major sojourn but in which they do not maintain a legal residence.

Sergeant Carrington for instance who resided in Texas and worked and spent a good part of his time in a neighboring state, undoubtedly may have a deep and abiding interest in local affairs in the state where he works. Yet, being a resident of Texas, he is properly excluded from the franchise in the other state.

4. It is submitted that residence in a general governmental unit, in the same manner and to the same extent as school patronage under Section 2012, constitutes a person as a *member of a community of interest.* This community of interest, in the case of residence in a municipal unit or state is as close as the Legislature can come to assuring an intelligently informed electorate, exposed to the problems, issues and candidates of the general governmental unit, the functions of which cover a great many different and divergent matters.

In the case of the school districts here involved, the community of interest is not so much a geographic community as it is the community of school patrons of which Section 2012 requires a person to be a member in order to qualify for the vote on matters directly affecting only such patrons.

While Judge Weinstein feels that a school district should not be compared to a sewer district—and of course they are worlds apart—the principles underlying the question of voting on the special services involved are exactly the same. A person who does not use the services of the sewer district or who does not directly pay for all or part thereof, can have no constitutionally protected interest in the operations of the district. He may be personally deeply interested in good sanitation in or near his community, and he may be highly knowledgeable in the field of sanitation, but he can have no actual interest in the operations of the district nor, therefore, a constitutional right to vote in the district.

The same is true, of course, of many other types of special purpose administrative units throughout the United States, such as—to use an example more in keeping with the enlightenment provided by school districts—lighting districts. The mere fact that an occasional passer-by may have a strong interest in such lighting, and be incidentally benefited thereby, does not entitle him to vote on the establishment and operations of the district, the vote on which is limited to the persons for whose primary use the services have been established and to those who directly pay for them.

POINT II

Section 2012 is based on a sound rationale essential for the operation of the schools.

In addition to the rationale discussed in Point I above, there is a very cogent basis for maintaining the difference between the voting qualifications used in the general elections for state and general governmental purposes, and those used in school districts.

It has been the consistent policy of the State over the many years to keep party political considerations out of the state school system.

Human nature being what it is, such policy has not always been entirely successful. There have been times in various areas of the state, where a teacher in order to teach had to contribute a part of his or her salary to the coffers of the political party in power at the time. There have been times where the selection of teachers rested with party political bosses and municipal officials. In the City School District of the City of New York this problem has, in part, been met by a statute requiring the maintenance of a board of examiners and the limitation of teaching licenses and appointments to one of the top 3 candidates in competitive examinations. In the rural and suburban areas where party political influences operate largely in different channels, the method of eliminating party political influences from the school system has been Section 2012 which maintains voting qualifications different from those used in general elections. As pointed out in our Motion to Affirm (Point II, B., 2.) this system has served the State's school system well.

It is submitted therefore that such a rational enactment does not invidiously discriminate but rather serves to undergird the educational edifice by eliminating party political conflicts and passions from the school system so far as this can be done through legislation.

POINT III

Errors in the dissent below.

The following comments are offered in relation to certain erroneous statements in the dissenting opinion below.

1. The statement that "the structure of local government mandates that it is the county, towns and villages which bear the responsibility for much of the expense attributable to school district activities" is without foundation in fact, as far as the school districts are concerned which are here involved.

General governmental expenses of counties, towns and villages are caused by the number of people residing therein. The expenses "attributable to school district activities" are borne entirely by the school districts. It is a basic principle of New York State law that municipalities (as distinguished from school districts) have no connection with the State school system. While, historically the school district originally was a subdivision of a town, there are today more than half of New York State school districts located in more than one county, some 60 are located in three counties and about 20 are located in four counties. Education has consistently been held to be a state function as distinguished from municipal functions. Municipalities have no authority to act in the education field. While the Education Law authorizes a county to establish a county vocational and extension board, this function has long since

been taken over by an intermediate organization of school districts, known as the board of cooperative educational services. The last such county board, in Nassau County, has since been replaced by such a cooperative board and while the Nassau County board is still in existence it no longer has any functions connected with or relating to elementary and secondary education. It is our understanding that it only operates schools for firemen which of course is a municipal function (as to community colleges, see below under 8.).

2. The statement inferring that the operation of school districts "influences the price of goods and services" is likewise untenable. We are not aware of any such influence in any of the districts here involved.

3. The statement that assessment and school district tax collection are areas in which school district activities are paid for by municipalities are likewise without foundation in New York State law.

In the districts here involved the assessments (for all purposes) are done by town assessors, and in a few counties by county assessors. These assessments however are not made for school district purposes. The school district of course, in order to avoid duplicate assessment staffs are required by law to utilize municipal assessment rolls. These rolls however would need to be established even if the school districts had their own procedures and staffs. There is no extra cost to the municipalities in this connection. As far as school district tax collection is concerned the same is done by the school districts, except in a few counties where a special county tax act exists. Outside of such special counties, the county enforces uncollected school taxes on behalf of the school districts but fees sufficient to cover the extra expenses of such enforcement are charged against

the school districts involved. Again, the municipality does not carry the burden of school district activities. Even in those counties with special tax acts, penalties and interests on uncollected taxes go to the municipality, rather than to the school district, thus, generally speaking reimbursing the municipality for the costs of collection. Generally speaking such special tax acts try to achieve a saving in tax collecting procedures by combining town, county, school district and special district taxes.

Even if there were a remnant of expense falling upon the municipality, appellant herein, it must be remembered is not disfranchised by Education Law, Section 2012, from voting on any town or county matters or in relation to any other special districts which may be involved in such minute fractions of municipal expenses, if any there be.

4. The statements that appellant is disfranchised on library matters is of no probative value here. Of a total of 728 public libraries and free association libraries in the State of New York, only 117 are established and supported by school districts (some of which do not fall into the category of districts here involved). In the remaining 611 such libraries, there is no vote by school district voters or, practically speaking, by any other voter. These are largely supported by municipalities where the voter has no voice.

5. The statement that school districts are an outlet for the "political energies" and "political action" of the community, is squarely contrary to the well established policy to keep politics strictly divorced from school district matters. The use of public school buildings for general elections, of course, is so traditional that the theoretical ability of voters to pass on this subject must, for all practical purposes be completely discarded.

6. a. The dissent speaks of the loss of appellant's vote in relation to adult education. It must be pointed out that Education Law, Section 1712 makes the offering of adult education courses mandatory at any time that 20 or more persons make application for such instruction (Education Law, Section 1712, subdivision 3). Thus, the offering of such course does not depend on a vote of the qualified voters of the district but on a person desiring a specific course of instruction finding 19 others who also desire the course. This in turn rests on practical considerations which make a course offered for a smaller group than the statutory number impractical for financial reasons.

b. Recreation.

The dissenting opinion states that appellant is disfranchised in this connection also. The General Municipal Law (Section 244-b) and the Executive Law (Section 422), of the State of New York authorize contracts between school districts and municipalities for the provision of various recreational programs and facilities. This is generally the basis for such programs and facilities and since appellant is not disfranchised from voting in the affairs of whatever municipality may be involved, he certainly has not lost whatever rights if any may exist in this respect.[4]

7. The dissenting opinion refers to various non-property taxes levied by counties for educational purposes. There are various statutes authorizing such action by a county. As indicated however appellant has not lost his voice in county affairs and therefore cannot be heard to complain in this respect. It may be stated that only a very

[4] See also Point IV below, in relation to the peripheral and purely incidental nature of such activities, as compared with the central issue here involved.

few counties in the State of New York utilize this procedure.

8. The dissenting opinion also speaks of county or other municipal expenses in relation with community colleges. It must be noted that school districts have nothing whatever to do with community colleges in that school districts are not authorized to operate beyond the twelfth year of instruction. The only exception from this rule is that a school district does have the right to become the local sponsor of a community college. The fact of the matter is however that only 3 school districts in the State have done so and all of these are city school districts, in which the voting qualifications of Section 2012 do not apply (Auburn, Corning and New York City).

9. The dissent also claims that school district operations have a strong impact on fiscal decision of other local governments. We are not aware of any such impact. If there is however, the action of the municipality or other local government is not precluded to appellant who is not defranchised by Education Law, Section 2012 from such vote as he may have in connection with any such other local government or municipality.

10. Judge Weinstein also speaks of the loss of control by appellant over the matter of state and federal aid to education. Again, however, it must be pointed out that, as far as state aid is concerned, the formula for the same is contained in state legislation in connection with which appellant certainly is not in any way disfranchised. The same thing is true as to federal aid, as we indicated in both respects in our Motion to Affirm.

11. The dissent states that Section 2012 disfranchises "clergy, military and others living on tax exempt prop-

erty." This is incorrect in that any such persons who have children attending the public schools or have such a child living with them are qualified to vote if they meet citizenship, residence and majority requirements. Furthermore, where properties are only partially tax exempt, even such disqualification would not apply. A statement is also made that parents whose children "attend special public schools outside the district" are disqualified. Where a student attends a public school outside of the district under a district contract, it has been held that such outside school by virtue of the contract, becomes a school "of the district." Hence the disqualification does not apply in such cases.

12. Reference is made, for some reason, to "decentralization," which, it is submitted has nothing to do with the subject. Such decentralization refers entirely to the New York City School District which is not here involved. The point in such decentralization, to a large extent, is to reduce the operating unit from 1,100,000 pupils to a number of pupils not much in excess of 25,000 to 30,000 pupils. No district outside of the City School District of the City of New York even approaches such pupil population figure.

13. The dissent also states that it was only the *lower* New York Courts that have held that Section 2012 does not violate the State Constitution. The fact of the matter is that the Court of Appeals, the State's highest Court, made its decision in this matter, affirming the lower Courts.

See our Motion to Affirm (Point I, B., 2, p. 24 and Appendix C).

14. It is submitted therefore that any statements in the dissenting opinion below relating to the above points, must be discounted.

POINT IV

The dissent relies too heavily on peripheral matters.

Such matters as recreation, the use of school buildings for concerts and other community activities are merely incidental to the operations of the State's education system.

They do not go to the heart of the processes here involved, nor is there any reason why such programs necessarily have to be offered through the public school system. There are many areas where such services are rendered through other municipal units as well as through private interested groups, institutions and clubs.

The provision of elementary and secondary education, on the other hand, does go to the very heart of the life of our body politic. It is the very importance of this basic process that makes it so essential that the group of people controlling this process through the vote be carefully defined and limited. It is for this very reason that it is so essential that only those persons who may reasonably be expected to *have* the necessary knowledge and information and those who may reasonably be expected to have a strong enough interest, *i.e.*, through their pocketbook, to *acquire* such knowledge and information, be given the franchise.

While those persons outside the community of school patrons may or may not have a sufficient interest, may or may not be knowledgeable and may or may not be able and willing to devote the very considerable amount of time necessary to acquire such knowledge and information, the Legislature, in the reasonable performance of its constitutional functions must be given the necessary leeway to determine that, based on sound reason and the common experience of life, the paramount interests of the education

system will best be served by a limitation of the franchise to the community of school patrons.

It is obvious of course that the wisdom of such a course of action may be the subject of disagreement among reasonable men.

This Court however is not called upon to decide matters of discretion, of legislative wisdom or of desirability of legislation.

The Courts below have properly held that the statute in question does not invidiously discriminate and is therefore constitutionally unobjectionable. This is reinforced by a decision of the State's highest Court, to the same effect.

POINT V

The so-called "First Amendment issues."

1. The dissent states that Section 2012 discriminates against persons "because of their religious beliefs." This is stated to be so "*solely*" because they chose to send their children to "parochial or other private schools." This statement is self-contradictory because there certainly is no religious discrimination in relation to those hundreds of thousands of people who send their children to private schools which have no religious connections. A further contradiction is also contained in the very statement that this discrimination is based "solely" on the attendance of such pupils at non-public schools. This, of course, is not the point. There probably are people who would like to send their children to the public schools but consider non-public schools preferable for a variety of reasons. Again, however, this is merely a peripheral or tangential consideration as well as purely speculative. The point is that these people are not members of the community of school

patrons. They neither pay for such services nor do they accept them. These people are disfranchised not by the statute, but by their own choice of a different community of interest which choice of course is open to them.

2. The dissent contains a statement to the effect that "the effective power of non-voters in an important mode of expression and association" is limited.

Even where First Amendment freedoms are involved, this Court has held that "a compelling interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms" (*NAACP* v. *Button*, 371 U. S. 415, 438).

It is respectfully submitted, however, that there is no reason whatsoever that appellant and others like him cannot offer any advice or comment they wish to make to a local board of education or to the local public school administration. There is furthermore no reason why appellant, if indeed he were so interested in public education as he claims, could not offer his services on one of the many citizens committees which traditionally work with local boards of education and from which such boards derive great help and assistance. There is no reason whatever why members of such committees must be qualified to vote in the district. On the contrary, to the extent that a board of education is able to do so, it customarily brings in any knowledgeable person on whatever the subject of the committee may be, even without referring to the residence of such persons inside or outside of the district. Thus any claim that appellant's freedom of expression or association has been limited, is wholly untenable.

POINT VI

Reductio ad absurdum.

The absolute rule contended for by the appellant would require completely absurd results.

Appellant relies heavily on a statement from *Harper* (383 U. S. 664):

> "for it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

If this passage were to state the absolute rule—and appellant does claim that he has the *right, under the United States Constitution,* to vote in school district affairs—then obviously, if such an absolute right were to exist, the laws as applicable in the so-called "Big 6" city school districts to the effect that no one votes on school matters of any kind, would be clearly in violation of the Equal Protection Clause.

In addition if such were the absolute rule, in city school districts of less than 125,000 population, the voters could not be limited, as the New York State Education Law does, to a very small number of matters such as an increase in the Constitutional Tax and Debt Limitation, to election of board members in the 51 city school districts where such members are elected rather than appointed, and to the larger bond issues (where the approval is not of the expenditure of funds but merely of the bond resolution first adopted by the board of education).

Such absolute rule would likewise eliminate the possibility of appointed boards of education. There are only 9 such boards of education in the state while in the more than 800 other school districts, school boards are elected.

Such absolute rule would likewise prohibit the limitation of the powers of the voters to a vote on matters other than teacher's salaries and the group of items known as "ordinary contingent expenses." All these historic dispositions of the structure of the New York State Education System would need to fall, if such absolute rule were to obtain.

It is our position of course that the limitation of the franchise to the community of school patrons does not constitute any kind of discrimination, much less an invidious one.

POINT VII

The equities.

As pointed out in our Motion to Affirm (Point II., D.), it is submitted that the Court must weigh the use of the extraordinary remedy of injunction against the enforcement of a state statute, in the light of a comparison between the non-existing "rights" of a person who has no interest whatever in the operations of this special purpose administrative unit, and the results upon the New York State Education System which the granting of this extraordinary remedy of injunction would engender.

As was pointed out in our Motion to Affirm (Point I., B., 2.) the State Courts have held consistently that the New York State constitutional provision relating to voting qualifications (Article II., Section I.) does not apply to the New York State school districts.

Consequently, if Section 2012 were to be invalidated, in the absence of any state law providing alternative provisions for voting qualifications in school districts, the school system would necessarily come to a grinding halt. Between the date of any such invalidation by the Court and the time that the New York State Legislature can,

and does, provide the missing link in school district voting qualifications, no school district meeting or election could be held. In this connection it is of course vital to understand that in this State there is no connection between school district boundaries and municipal boundaries which in turn include general election district boundaries. Even if the general election voting qualifications did apply—which, as indicated, is not the case in New York—there would be no general election registers or records of voters as they relate to school district boundaries and it would be impossible from the existing municipal registers to determine which school district voters are and which are not residents of the school district.

There will be innumerable cases, during such period, where emergency meetings of district voters must be held. This may be in connection with school district reorganizations, school building construction proposals and many other matters where immediate action is necessary. This means that State legislation would necessarily be required to implement any such decision. Until such legislation is enacted, no school district meeting or election could be held, no matter how urgent the need therefore may be.

It is submitted that such a comparison must lead to the conclusion that such injury to the state school system could not possibly be justified by such non-existing interest of appellant.

Conclusion

Appellees beg leave to incorporate the extensive arguments (with authorities, statutes and appendices) contained in their Motion to Affirm, together with the opinions of Judges Zavatt, Lumbard, Moore and Bartels, as part of this brief.

It is respectfully submitted that the statute under attack herein does not invidiously discriminate against appellant; that the Federal Question is not substantial; that the requirement of membership in the community of school patrons as a required voting qualification in this special purpose administrative unit is as well within the constitutional power of state legislation as the general requirement of residence as such qualification, and is, in fact, not justiciable; that previous decisions of this Court sustain the position of appellees; and that, therefore, the judgment below should be affirmed and the appeal herein dismissed.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR APPELLEES

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Appendix A

Copy of Senate Bill No. 43, 1969-1970 Regular Sessions, Concurrent Resolution of the Senate and Assembly A-1

IN THE

Supreme Court of the United States

October Term, 1968

No. 258

MORRIS H. KRAMER,

Appellant,

v.

UNION FREE SCHOOL DISTRICT NO. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR APPELLEES

Statement

Pursuant to Rule 41, subdivision 5 of the Rules of this Court, and supplementing Point II, Item C of appellees' Motion to Affirm, there is appended hereto as Appendix A a copy of a Concurrent Resolution of the Senate and Assembly of the State of New York, Senate Bill No. 43, 1969-1970 Regular Sessions, introduced by Senator Greenberg, which was pre-filed and which will be introduced on January 8, 1969.

The resolution proposes an amendment to Section I of Article II of the Constitution, in relation to qualifications for voting.

The text of the proposed amendment speaks for itself, except that it should be pointed out that the term "special district" referred to therein, does not include a school district. New York State statute law defines the term "special district" as excluding a school district (*cf.* New York State General Municipal Law, Section 30).

The purpose of submitting this document is to show that, as indicated in our Motion to Affirm, the political processes involved in the cause at bar are adequate, available and actually in progress.

The dissent below refers to the comparatively small number of persons "disfranchised" by New York State Education Law, Section 2012 as a basis for the claim of inadequacy of the political processes in this connection. It is submitted that the inclusion of similar propositions in the recently defeated Constitutional Convention and the introduction of the Concurrent Resolution attached hereto contradict such an assumption of inadequacy.

Respectfully submitted,

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APPENDIX A

STATE OF NEW YORK

43

1969-1970 Regular Sessions

IN SENATE

(Prefiled)

January 8, 1969

Introduced by Mr. GREENBERG—read twice and ordered printed and when printed to be committed to the Committee on Judiciary

CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY

Proposing an amendment to section one of article two of the constitution, in relation to qualifications for voting

Section 1. Resolved (if the Assembly concur), That section one of article two of the constitution be amended to read as follows:

Section 1. Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is twenty-one years of age or over and shall have been a resident of this state, and of the county, city, or village for three months next preceding an election *and a resident of the election district in which he offers his vote for thirty days next preceding an election. There shall be no property or any other qualification or test to vote in any election except the legislature may provide*

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

that the ownership of property shall be a qualification for voting in an improvement or special district election and, in primary elections, party enrollment may be required.

Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English.

§ 2. Resolved (if the Assembly concur), That the foregoing amendment be referred to the first regular legislative session convening after the next succeeding general election of members of the assembly, and, in conformity with section one of article nineteen of the constitution, be published for three months previous to the time of such election.

SUPREME COURT OF THE UNITED STATES

No. 258.—October Term, 1968.

Morris H. Kramer, Appellant, v. Union Free School District No. 15 et al.	On Appeal From the United States District Court for the Eastern District of New York.

[June 16, 1969.]

Mr. Chief Justice Warren delivered the opinion of the Court.

In this case we are called on to determine whether § 2012 of the New York Education Law is constitutional. The legislation provides that in certain New York school districts residents who are otherwise eligible to vote in state and federal elections may vote in the school district election only if they (1) own (or lease) taxable real property within the district, or (2) are parents (or have custody of) children enrolled in the local public schools. Appellant, a bachelor who neither owns nor leases taxable real property, filed suit in federal court claiming that § 2012 denied him equal protection of the law in violation of the Fourteenth Amendment. With one judge dissenting, a three-judge District Court dismissed appellant's complaint. Finding that § 2012 does violate the Equal Protection Clause of the Fourteenth Amendment, we reverse.

I.

New York law provides basically three methods of school board selection. In some large city districts, the school board is appointed by the mayor or city council. N. Y. Educ. Law §§ 2553 (2), (4) (McKinney 1953) as amended (McKinney Supp. 1968). On the other hand, in some cities, primarily those with less than 125,000

residents, the school board is elected at general or municipal elections in which all qualified city voters may participate. N. Y. Educ. Law §§ 2502 (2), 2553 (3) (McKinney 1953). Cf. N. Y. Educ. Law § 2531 (McKinney 1953). Finally, in other districts such as the one involved in this case, which are primarily rural and suburban, the school board is elected at an annual meeting of qualified school district voters.[1]

The challenged statute is applicable only in the districts which hold annual meetings. To be eligible to vote at an annual district meeting, an otherwise qualified[2] district resident must either (1) be the owner or lessee of taxable real property located in the district, (2) be the spouse of one who owns or leases qualifying property, or (3) be the parent or guardian of a child enrolled for a specified time during the preceding year in a local district school.

Although the New York State Department of Education has substantial responsibility for education in the State, the local school districts maintain significant control over the administration of local school district affairs.[3] Generally, the board of education has the basic

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[1] In some districts the election takes place on the Wednesday following the district meeting. N. Y. Educ. Law § 2013 (McKinney Supp. 1968).

[2] The statute also requires that a voter be a citizen of the United States and at least 21 years of age. Appellant meets these requirements and does not challenge the citizenship, age or residency requirements of § 2012. See *infra*, at —. The statute is set out in the Appendix, *infra*.

[3] "But while the administration of schools and the formulation of general policies have been centralized in the State Education Department . . . the immediate control and operation of the schools in New York have to a large extent been vested in the localities. The thousands of districts . . . possess a high degree of authority in education. They decide matters of local taxation for school purposes, elect trustees and other school officials, purchase buildings

responsibility for local school operation, including prescribing the courses of study, determining the textbooks to be used, and even altering and equipping a former schoolhouse for use as a public library. N. Y. Educ. Law § 1709 (McKinney 1953). Additionally, in districts selecting members of the board of education at annual meetings, the local voters also pass directly on other district matters. For example, they must approve the school budget submitted by the school board. N. Y. Educ. Law §§ 2021, 2022 (McKinney 1953).[4] Moreover, once the budget is approved, the governing body of the villages within the school district must raise the money which has been declared "necessary for teachers' salaries and the ordinary contingent expenses [of the schools]." N. Y. Educ. Law § 1717 (McKinney 1953).[5] The voters also may "authorize such acts and vote for such taxes as they shall deem expedient . . . for equipping for library use any former schoolhouse, . . . [and] for the purchase of land and buildings for agricultural, athletic, playground or social center purposes . . . ." N. Y. Educ. Law § 416 (McKinney 1953).

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and sites, employ teachers and . . . maintain discipline. . . ." Graves, Development of the Education Law in New York, 16 Consolidated Laws of New York (Education Law) xxiii (McKinney 1953). See R. Pyle, Some Aspects of Education in New York 9–13 (1967).

[4] In districts which do not have annual meetings, the budget is not submitted to district voters. Thus, in city districts where the board of education is elected by all the voters, the board has the power to set the budget and assess taxes to meet expenditures. In large city districts, where the board is appointed, the board must submit requests to the city government, much as would any other city department. R. Pyle, Some Aspects of Education in New York 11 (1967).

[5] The legislation provides that the money shall be raised through a "tax to be levied upon all the real property in the . . . village. . . ." And, "the corporate authorities shall have no power to withhold the sums so declared to be necessary . . . ." N. Y. Educ. Law § 1717 (McKinney 1953).

Appellant is a 31-year-old college-educated stockbroker who lives in his parents' home in the Union Free School District No. 15, a district to which § 2012 applies. He is a citizen of the United States and has voted in federal and state elections since 1959. However, since he has no children and neither owns nor leases taxable real property, appellant's attempts to register for and vote in the local school district elections have been unsuccessful. After the school district rejected his 1965 application, appellant instituted the present class action challenging the constitutionality of the voter eligibility requirements.

The United States District Court for the Eastern District of New York denied appellant's request (made pursuant to 28 U. S. C. § 2281) that a three-judge district court be convened, and granted appellees' motion to dismiss appellant's complaint. *Kramer* v. *Union Free School District No. 15*, 259 F. Supp. 164 (D. C. E. D. N. Y. 1966). On appeal, the Court of Appeals for the Second Circuit reversed, ruling appellant's complaint warranted convening a three-judge court. *Kramer* v. *Union Free School District No. 15*, 379 F. 2d 491 (C. A. 2d Cir. 1967). On remand, the three-judge court ruled that § 2012 is constitutional and dismissed appellant's complaint. Pursuant to 28 U. S. C. § 1253, appellant filed a direct appeal with this Court; we noted probable jurisdiction. 393 U. S. 818 (1968).

II.

At the outset, it is important to note what is *not* at issue in this case. The requirements of § 2012 that school district voters must (1) be citizens of the United States, (2) be bona fide residents of the school district, and (3) be at least 21 years of age are not challenged. Appellant agrees that the States have the power to impose reasonable citizenship, age and residency require-

ments on the availability of the ballot. Cf. *Carrington* v. *Rash*, 380 U. S. 89, 91 (1965); *Pope* v. *Williams*, 193 U. S. 621 (1904). The sole issue in this case is whether the *additional* requirements of § 2012—requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections—violate the Fourteenth Amendment's command that no State shall deny persons equal protection of the laws.

"In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances of the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968). And, in this case, we must give the statute a close and exacting examination. "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U. S., 533, 562 (1964). See *Williams* v. *Rhodes*, *supra*, at 31; *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964). This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legtimacy of representative government.

Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court. *Reynolds* v. *Sims*, *supra*. See *Avery* v. *Midland County*, 390 U. S. 494 (1968). No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by

residence and age.[6] Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.[7] Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See *Carrington* v. *Rash*, *supra*, at 96.

And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections.

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[6] This case presents an issue different from the one we faced in *McDonald* v. *Board of Election Comm'rs of Chicago*, — U. S. — (1969). The present appeal involves an absolute denial of the franchise. In McDonald, on the other hand, we were reviewing a statute which made casting a ballot easier for some who were unable to come to the polls. As we noted, there was no evidence that the statute absolutely prohibited anyone from exercising the franchise; at issue was not a claimed right to vote but a claimed right to an absentee ballot. *Id.*, at —.

[7] Of course, the effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes. For example, if school board members are appointed by the mayor, the district residents may effect a change in the board's membership or policies through their votes for the mayor. Cf. N. Y. Educ. Law §§ 2553 (2), (4) (McKinney 1953). Each resident's formal influence is perhaps indirect, but it is equal to that of other residents. However, when the school board positions are filled by election and some otherwise qualified city electors are precluded from voting, the excluded residents, when compared to the franchised residents, no longer have an effective voice in school affairs. This is precisely the situation with regard to the size of the school budget in districts where § 2012 applies. See n. 4, *supra*.

Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made [8] are not applicable. See *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 670 (1966). The presumption of constitutionality and the approval given "rational" classifications in other types of enactments [9] are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. And, the assumption is no less under attack because the legislature which decides who may participate at the various levels of political choice is fairly elected. Legislation which delegates decision-making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting.[10]

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[8] See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 425–428 (1961); *Allied Stores* v. *Bowers*, 358 U. S. 522, 527 (1959); *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552, 556 (1947).

[9] Of course, we have long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny, regardless of the subject matter of the legislation. See, *e. g.*, *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964); *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 420 (1948); *Oyama* v. *California*, 332 U. S. 633, 640 (1948).

[10] Thus, statutes structuring local government units receive no less exacting an examination merely because the state legislature is fairly elected. See *Avery* v. *Midland County*, 390 U. S. 474, 481, n. 6 (1968).

The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment.[11] States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters. In fact, we have held that where a county school board is an administrative, not legislative, body, its members need not be elected. *Sailors* v. *Kent Bd. of Education*, 387 U. S. 105, 108 (1967). However, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper* v. *Virginia Bd. of Elections*, *supra*, at 665.[12]

Nor is the need for close judicial examination affected because the district meetings and the school board do not have "general" legislative powers. Our exacting examination is necessitated not by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not. For example, a city charter might well provide that the elected city council appoint a mayor who would have broad administrative powers. Assuming the council were elected consistent with the commands of the Equal Protection Clause, the delegation of power to the mayor would not

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[11] Similarly, no less a showing of a compelling justification for disenfranchising residents is required merely because the questions scheduled for the election need not have been submitted to the voters.

[12] In *Sailors* v. *Kent Bd. of Education*, 387 U. S. 105 (1967), each local school board sent one delegate to a biennial meeting at which the members of the county board of education were selected. We noted that "the choice of members of the county school board did not involve an election." *Id.*, at 111. However, we also pointed out that the members of the local school boards, who in effect made the county board appointments, were elected, but that "no constitutional complaint [was] raised respecting that election." *Ibid.*

call for this Court's exacting review. On the other hand, if the city charter made the office of mayor subject to an election in which only some resident citizens were entitled to vote, there would be presented a situation calling for our close review.

III.

Besides appellant and other who similarly live in their parents' homes, the statute also disenfranchises the following persons (unless they are parents or guardians of children enrolled in the district public school): senior citizens and others living with children or relatives; clergy, military personnel and others who live on tax-exempt property; boarders and lodgers; parents who neither own nor lease qualifying property and whose children are too young to attend school; parents who neither own nor lease qualifying property and whose children attend private schools.

Appellant asserts that excluding him from participation in the district elections denies him equal protection of the law. He contends that he and others of his class are substantially interested in and significantly affected by the school meeting decisions. All members of the community have an interest in the quality and structure of public education, appellant says, and he urges that "the decisions taken by local boards . . . may have grave consequences to the entire population." Appellant also argues that the level of property taxation affects him, even though he does not own property, as property tax levels affect the price of goods and services in the community.

We turn therefore to question whether the exclusion is necessary to promote a compelling state interest. First, appellees [13] argue that the State has a legitimate

[13] The Union Free School District No. 15 and each member of its board of education were named as defendants. The Attorney General of New York intervened as an appellee.

SUPREME COURT OF THE UNITED STATES

No. 258.—October Term, 1968.

Morris H. Kramer, Appellant, v. Union Free School District No. 15 et al.	On Appeal From the United States District Court for the Eastern District of New York.

[June 16, 1969.]

Mr. Justice Stewart, with whom Mr. Justice Black and Mr. Justice Harlan join, dissenting.

In *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, this Court upheld against constitutional attack a literacy requirement, applicable to voters in all state and federal elections, imposed by the State of North Carolina. Writing for a unanimous Court, Mr. Justice Douglas said:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope* v. *Williams*, 193 U. S. 621, 633; *Mason* v. *Missouri*, 179 U. S. 328, 335, absent of course the discrimination which the Constitution condemns." 360 U. S., at 50–51.

Believing that the appellant in this case is not the victim of any "discrimination which the Constitution condemns," I would affirm the judgment of the District Court.

The issue before us may be briefly summarized. New York has provided that in certain areas of the State, local authority over public schools shall reside in "Union Free School Districts," such as the District involved here. In such areas, the qualified voters of the District annually elect members of a Board of Education and determine by vote the basic fiscal policy of the school system: they adopt a budget and in effect decide the amount of school

taxes that shall be imposed upon the taxable real property of the District. State and federal grants provide some additional funds for the operation of the school system, but the only method by which the District itself may raise its own revenue is through such property taxes.[1]

Three classes of persons are qualified under New York law to vote in these school elections: (1) parents or guardians of children attending public schools within the District; (2) persons who own taxable real property within the District, and their spouses; and (3) persons who lease taxable real property within the District, and their spouses.[2] The appellant, a bachelor who lives with his parents and who neither owns nor leases any real property within the District, falls within none of those classes, and consequently is disqualified from voting despite the fact that he meets the general age and residence requirements imposed by state law. The question presented is whether, by virtue of that disqualification, the appellant is denied the equal protection of the laws.

Although at times variously phrased, the traditional test of a statute's validity under the equal protection clause is a familiar one: a legislative classification is invalid only "if it rest[s] on grounds wholly irrelevant to achievement of the regulation's objectives." *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552, 556.[3]

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[1] The District Court's statement to this effect has been explicitly reiterated and emphasized by the appellees, and the proposition is apparently conceded by the appellant. See N. Y. Educ. Law §§ 416, 1717, 2021; N. Y. Real Prop. Tax Law §§ 1302, 1306, 1308.

[2] New York's general age and residence requirements must also be met.

[3] See also *McGowan* v. *Maryland*, 366 U. S. 420, 425–426:

"The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their

It was under just such a test that the literacy requirement involved in *Lassiter* was upheld. The premise of our decision in that case was that a State may constitutionally impose upon its citizens voting requirements reasonably "designed to promote intelligent use of the ballot." 360 U. S., at 51. A similar premise underlies the proposition, consistently endorsed by this Court,[4] that a State may exclude nonresidents from participation in its elections. Such residence requirements, designed to help ensure that voters have a substantial stake in the outcome of elections and an opportunity to become familiar with the candidates and issues voted upon, are entirely permissible exercises of state authority. Indeed, the appellant explicitly concedes, as he must, the validity of voting requirements relating to residence, literacy, and age. Yet he argues—and the Court accepts the argument—that the voting qualifications involved here somehow have a different constitutional status. I am unable to see the distinction.

Clearly a State may reasonably assume that its residents have a greater stake in the outcome of elections held within its boundaries than do other persons. Likewise, it is entirely rational for a state legislature to suppose that residents, being generally better informed regarding state affairs than are nonresidents, will be more likely than nonresidents to vote responsibly. And the same may be said of legislative assumptions regarding the electoral competence of adults and literate persons on the one hand, and of minors and illiterates on the other. It is clear, of course, that lines thus drawn can-

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laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

[4] *Pope* v. *Williams*, 193 U. S. 621; *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 51; *Carrington* v. *Rash*, 380 U. S. 89, 93–94, 96; see *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 666.

interest in limiting the franchise in school district elections to "members of the community of interest"—those "primarily interested in such elections." Second, appellees urge that the State may reasonably and permissibly conclude that "property taxpayers" (including lessees of taxable property who share the tax burden through rent payments) and parents of the children enrolled in the district's schools are those "primarily interested" in school affairs.

We do not understand appellees to argue that the State is attempting to limit the franchise to those "subjectively concerned" about school matters. Rather, they appear to argue that the State's legitimate interest is in restricting a voice in school matters to those "directly affected" by such decisions. The State apparently reasons that since the schools are financed in part by local property taxes, persons whose out-of-pocket expenses are "directly" affected by property tax changes should be allowed to vote. Similarly, parents of children in school are thought to have a "direct" stake in school affairs and are given a vote.

Appellees argue that it is necessary to limit the franchise to those "primarily interested" in school affairs because "the very increasing complexity of the many interacting phases of the school system and structure make it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operations of the school system." Appellees say that many communications of school boards and school administrations are sent home to the parents through the district pupils and are "not broadcast to the general public"; thus, nonparents will be less informed than parents. Further, appellees argue, those who are assessed for local property taxes (either directly or indirectly through rent) will have enough of an interest "through the burden on their pocket books to acquire such information as they may need."

We need express no opinion as to whether the State in some circumstances might limit the exercise of the franchise to those "primarily interested" or "primarily affected." Of course, we therefore do not reach the issue of whether these particular elections are of the type in which the franchise may be so limited. For, assuming *arguendo* that New York legitimately might limit the franchise in these school district elections to those "primarily interested in school affairs," close scrutiny of the § 2012 classifications demonstrates that they do not accomplish this purpose with sufficient precision to justify denying appellant the franchise.

Whether classifications allegedly limiting the franchise to those resident citizens "primarily interested" deny those excluded equal protection of the law depends, *inter alia*, on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal.[14] Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. The classifications in § 2012 permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.[15]

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[14] Of course, if the exclusions are necessary to promote the articulated state interest, we must then determine whether the interest promoted by limiting the franchise constitutes a compelling state interest. We do not reach that issue in this case.

[15] For example, appellant resides with his parents in the school district, pays state and federal taxes and is interested in and affected by school board decisions; however, he has no vote. On the other hand, an uninterested unemployed young man who pays no state or federal taxes, but who rents an apartment in the district, can participate in the election.

Nor do appellees offer any justification for the exclusion of seemingly interested and informed residents—other than to argue that the § 2012 classifications include those "whom the State could understandably deem to be the most intimately interested in actions taken by the school board," and urge that "the task of . . . balancing the interest of the community in the maintenance of orderly school district elections against the interest of any individual in voting in such elections should clearly remain with the legislature."[16] But the issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the § 2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. The requirements of § 2012 are not sufficiently tailored to limiting the franchise to those "primarily interested" in school affairs to justify the denial of the franchise to appellant and members of his class.

The judgment of the United States District Court for the Eastern District of New York is therefore reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[16] We were informed at oral argument, however, that a very small proportion of the eligible voters attend the meetings.

APPENDIX TO THE OPINION OF THE COURT.

Section 2012, New York Education Law:

"A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is: 1. A citizen of the United States. 2. Twenty-one years of age. 3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

"(a) Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase or is the spouse of one who leases, hires or is in possession under a contract of purchase of, real property in such district liable to taxation for school purposes, but the occupation of real property by a person as a lodger or boarder shall not entitle such person to vote, or

"(b) Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

"(c) Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting. No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section."

not infallibly perform their intended legislative function. Just as "[i]lliterate people may be intelligent voters,"[5] nonresidents or minors might also in some instances be interested, informed, and intelligent participants in the electoral process. Persons who commute across a state line to work may well have a great stake in the affairs of the State in which they are employed; some college students under 21 may be both better informed and more passionately interested in political affairs than many adults. But such discrepancies are the inevitable concomitant of the line-drawing that is essential to law-making. So long as the classification is rationally related to a permissible legislative end, therefore—as are residence, literacy, and age requirements imposed with respect to voting—there is no denial of equal protection.

Thus judged, the statutory classification involved here seems to me clearly to be valid. New York has made the judgment that local educational policy is best left to those persons who have certain direct and definable interests in that policy: those who are either immediately involved as parents of school children or who, as owners or lessees of taxable property, are burdened with the local cost of funding school district operations.[6] True, persons outside those classes may be genuinely interested in the conduct of a school district's business—just as commuters from New Jersey may be genuinely interested in the outcome of a New York City election. But unless this Court is to claim a monopoly of wisdom regarding the sound operation of school systems in the 50 States, I see no way to justify the conclusion that the legislative classification involved here is not rationally related to a legitimate legislative purpose. "There is no group more

[5] *Lassiter* v. *Northampton Election Bd.*, 360 U. S., at 52.

[6] Presumably the rationale for including lessees and their spouses in the electoral process is that the cost of property taxes is in many instances passed on from owner to lessee.

interested in the operation and management of the public schools than the taxpayers who support them and the parents whose children attend them." *Doremus* v. *Board of Educ.*, 342 U. S. 429, 435 (DOUGLAS, J., dissenting).

With good reason, the Court does not really argue the contrary. Instead, it strikes down New York's statute by asserting that the traditional equal protection standard is inapt in this case, and that a considerably stricter standard—under which classifications relating to "the franchise" are to be subjected to "exacting judicial scrutiny"—should be applied. But the asserted justification for applying such a standard cannot withstand analysis.

The Court is quite explicit in explaining why it believes this statute should be given "close scrutiny":

> "The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." (Footnote omitted.)

I am at a loss to understand how such reasoning is at all relevant to the present case. The voting qualifications at issue have been promulgated not by Union Free School District No. 15, but by the New York State Legislature, and the appellant is of course fully able to participate in the election of representatives in that body. There is simply no claim whatever here that the state government is not "structured so as to represent fairly all the people," including the appellant.

Nor is there any other justification for imposing the Court's "exacting" equal protection test. This case does

not involve racial classifications, which in light of the genesis of the Fourteenth Amendment have traditionally been viewed as inherently "suspect."[7] And this statute is not one that impinges upon a constitutionally protected right, and that consequently can be justified only by a "compelling" state interest.[8] For "the Constitution of the United States does not confer the right of suffrage upon any one . . . ." *Minor* v. *Happersett*, 21 Wall. 162, 178.

In any event, it seems to me that under *any* equal protection standard, short of a doctrinaire insistence that universal suffrage is somehow mandated by the Constitution, the appellant's claim must be rejected. First of all, it must be emphasized—despite the Court's undifferentiated references to what it terms "the franchise"—that we are dealing here not with a general election, but with a limited, special-purpose election.[9] The appellant is eligible to vote in all state, local, and federal elections in which general governmental policy is determined. He is fully able, therefore, to participate not only in the processes by which the requirements for school district voting may be changed, but also in those by which the levels of state and federal financial assistance to the Dis-

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[7] *Korematsu* v. *United States*, 323 U. S. 214, 216; *McLaughlin* v. *Florida*, 379 U. S. 184, 192.

[8] *Shapiro* v. *Thompson*, — U. S. —, —; cf. *NAACP* v. *Alabama*, 357 U. S. 449, 463.

[9] Special-purpose governmental authorities such as water, lighting, and sewer districts exist in various sections of the country, and participation in such districts is undoubtedly limited in many instances to those who partake of the agency's services and are assessed for its expenses. The constitutional validity of such a policy is, it seems to me, unquestionable. And while it is true, as the appellant argues, that a school system has a more pervasive influence in the community than do most other such special-purpose authorities, I cannot agree that that difference in degree presents anything approaching a distinction of constitutional dimension.

trict are determined. He clearly is not locked into any self-perpetuating status of exclusion from the electoral process.[10]

Secondly, the appellant is of course limited to asserting his own rights, not the purported rights of hypothetical childless clergymen or parents of preschool children, who neither own nor rent taxable property. The appellant's status is merely that of a citizen who says he is interested in the affairs of his local public schools. If the Constitution requires that he must be given a decision-making role in the governance of those affairs, then it seems to me that any individual who seeks such a role must be given it. For as I have suggested, there is no persuasive reason for distinguishing constitutionally between the voter qualifications New York has required for its Union Free School District elections and qualifications based on factors such as age, residence, or literacy.[11]

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[10] Compare *Lucas* v. *Forty-fourth General Assembly*, 377 U. S. 713, with *Reynolds* v. *Sims*, 377 U. S. 533. Since *Carrington* v. *Rash*, 380 U. S. 89, and *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, dealt with requirements for voting in general elections, those decisions do not control the result here.

[11] A comparison of the classification made by New York with one based on literacy, for instance, presumably would attempt to weigh the interest of the person excluded from voting against the reasonableness of the legislative assumption regarding his competence as a voter or his connection with the subject matter of the election. In such a speculative analysis precision is not attainable; for that very reason, it seems to me, the standard of adjudication should be a reasonably tolerant one. But even assuming such an analysis were attempted, it could not in my view justify drawing a constitutional line between the classification involved here and a literacy requirement. True, the appellant and persons in his class might be thought to have generally more ability to vote intelligently than do illiterates. On the other hand, illiterate citizens clearly have considerably more of a stake in the outcome of general elections than do the members of the appellant's class in the result of school district elections.

Today's decision can only be viewed as irreconcilable with the established principle that "[t]he States have . . . broad powers to determine the conditions under which the right of suffrage may be exercised . . . ." Since I think that principle is entirely sound, I respectfully dissent from the Court's judgment and opinion.